



London Printed for J. Wotton and John Wallthoe



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James De Lancey

1848

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Sept. 20

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Jure Maritimo

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NAVALI: 54

OR, A

TREATISE

OF

Affairs Maritime

AND OF

Commerce.

In Three BOOKS.

The SEVENTH EDITION carefully Corrected, with
the Addition of several Hundred References
and many Modern Cases never before Printed.

By *Charles Molloy*, late Barrester at Law.

LONDON:

Printed for JOHN WALTHOE Junior, over-against
the Royal Exchange in Cornhill, and J. WOTTON
the Three Daggers in Fleet-street, 1722.



ORIGINAL STATE

ORIGINAL STATE

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To the Right Honourable

JAMES Earl of Berkley, Vice-Admiral of *Great-Britain*, Premier Commissioner for Executing the Office of Lord High-Admiral of *Great-Britain*, and *Ireland*, &c. Knight of the most Noble Order of the Garter, Gentleman of His Majesty's Bed-Chamber, and One of the Lords of His Majesty's Privy Council.

MY LORD,

AS your Lordship is very justly placed at the Head of the greatest, best disciplin'd, and most victorious Fleet in the World, I should be wanting in my Duty to your Lordship, if I did not lay this new Edition of the following Treatise written by my Father (on Naval Maritime Affairs) at your Lordship's Feet.

It had the Honour to make its first Appearance in Publick, under the Protection of one of your Lordship's Predecessors in the Admiralty, which

The DEDICATION.

I hope will be its Excuse for soliciting on this Occasion, a Patronage of the same Dignity, and of a no less illustrious Name.

What Credit it deserves, and how serviceable it has been and may be to my Country, is humbly submitted to your Lordship's Consideration, the Book is too near related to me, to mention what the World has said in its Praise, 'tis the Usefulness of it alone that can recommend it to your Lordship, to whom every thing is dear, that tends to Publick Good.

Permit me, my Lord, most humbly to entreat your Acceptance of this Address, and to pardon the Liberty I have taken herein, and to assure your Lordship that it flows from the nearest Dictates of an honest and a grateful Mind; for I am with the most dutiful and profound Respect,

My LORD, your Lordship's

Most Obedient, and

Most Humble Servant,

Charles Molloy.

TO THE
READER.

THE Wisdom of God is highly to be admired who hath not endowed the other living Creatures with that Sovereign Perfection of *Wisdom*, but hath secured and provided for them by natural Muniments from Assault and Peril and other Necessities: But Man formed Naked and Frail, because of furnishing him with Wisdom, Understanding, Memory and Sense to govern his Actions; endowing him with that pious Affection of desiring Society, where one is inclined to Defend, Love, Cherish and afford mutual Aid to each other: Nor hath he in no wonderful manner (infinitely transcending all humane Wisdom and Understanding) Created the material World to be subservient to his Being and well-being: Yet without human Understanding and Reason did he not build a Ship, raise a Fort, bake Bread or Cloth; but these came to pass only by human Arts and Industry, in which by the Regulations of the Celestial Bodies, Times and Seasons, materials and other Necessaries are brought forth, the Alteration of which Men in their proper Seasons reap the Fruits of their Labour; so that there is no Society, * Nation, Country or Kingdom but stands in need of another: Hence it is that Men following each others Necessaries, are invited to *affick* and *Commerce* in the different Parts and conveniences of this vast World to supply each others Necessities, and adorn the Conveniencies of humane Life.

LaRantius
lib. 9.

* *Seneca 4. d.*
Beneficiis, cap
18.

* *Leg. ut vim.*
D. de just. & ar. n. 7, & 8.

And as God hath so ordered this wonderful Dependence of his Creatures on each other, so hath he by a Law immutable provided a Rule for Men in all their Actions, obliging each other to the Performance of that which is right, not only to Justice *, but likewise to all other Moral Virtues, the which is no more *but the dictate of right Reason founded in the Soul of Man, shewing the necessity to be in some act by its convenience and inconvenience in the rational Nature of Man, and consequently that it is either forbidden or commanded by the Author of Nature, who is the Eternal Creator of all things.* And as God hath imprinted this universal Law in the Minds of all Men, so hath he given Men Power (Society being admitted) to establish other Laws which proceed from the Will, the which is drawn from the Civil Power, that is, from him or them that Rule the Common-wealth or Society of Free men united for their common Benefit, (which is called the *Laws of Nations*) and which by the will of all or many Nations, hath received force to oblige, and is || proved by a continued use and Testimony of Authentick Memorials of Learned or Skilful Men.

|| *Vasquez 2.*
Controv. 54.4.

* *Florentius 3.*
part. tit. 22.
Sec. 5.
Leg. Servus D.
deserv. export
 || *Cicero Offic.*
lib. 11. de P-
netio.

Now by the Laws of Nature every Man is bound to profit another in what he can *, nor is the same only Lawful but Commendable; so true was that saying, *Nothing is more serviceable to Man than Man*. But if Man shall neglect this immutable Law in the aiding and assisting his Fellow Citizen, and inquire and dispute why God hath laid this Necessity upon him; and when Opportunity gives leave to take the benefit of Wind or Tide, (in order to his furnishing himself or Neighbour with those things that adorn humane Life) to dispute the Causes of their Flux and Reflux, and how they Vary and Change, he not only offends the Laws of Nature, but also

fuma

...mes a power of destroying Society, and consequently becomes (at the least) a wilful Transgressor of the Laws of Nations.

And though the Eternal Power hath so established this necessity in Mankind, that every Man should stand in need of another Man, yet so great Providence is over industrious Men, that scarce any Man not disabled by Nature or Accident, sickness, Impotency, and the like, but by his industry and pains may earn more than would supply his Necessities; and so much as any Man gets by being truly industrious above what supplies his Necessities, is so much beneficial to himself and family, as also an enriching to that Kingdom or State where he resides: From whence it is, That all Mankind (present or to come) are either Traders by themselves or others; and the Ends designed by Trade and Commerce, are Strength, Wealth and Employment for all Sorts of People, (where the same doth most flourish) the End * tending to the Advancement, Opulency, and Greatness of such a Kingdom or State.

* *Coke. 2. Inst. fol. 28.*

Constantinople (the Throne once of Christendom) having been sack'd by *Mahomet* the Second, became a place of desolation as well as horror, yet he by granting a free Trade and Religion, soon after repeopled that great (but unhappy) Spot. Nor did *Silemus* tread amiss in following the steps of his Victorious Predecessor, when having the like success on *Tauris* and *Grand Cairo*, he translated the *Persian* and *Egyptian* Artificers and Traders to that repeopled City, following the Example of the *Roman* Virtues. Nor did our Victorious Third *Edward* deem it an Act unbecoming his great Wisdom, when he brought in the *Walloons*, whose Industry soon established the Woollen Manufacture, he vouchsafing to

Anno 1453.
Vide Knowles
History of the
Monarchy.

*Mirror, Cap. 5.
Sect. 2.
11 Ed. 3 cap. 3:*

* Vide Cam-
dens Q. Eliza-
beth, An. 1568.

A. E. Meteran,
Pistor. Belg.
lib. 3.

give no less a Security for the enjoying their then granted Immunities and Privileges, than his own Royal Person. Nor did that politick Princess * shut her Ears from embracing the Offer of those distressed *Burgundians* (after the Example of her Great and Royal Predecessor) who sought Refuge in her Dominions from the rigid Severity of the long-bearded *Alva*, who planting themselves by her appointment at *Norwich, Colchester, Canterbury*, and other Towns, have of those places (then only Habitations for Beggars) raised them now in competition with (if not excelling) all, or most of the Cities in *England*, for Riches, Plenty, and Trade. Nor need we run into the History of earlier Times to give an Account of the many Kingdoms and States that have risen by Industry and Commerce; 'tis enough if we cast our Eyes on our Neighbour the *Hollander*, a place by relation of *Ortellius*, not much bigger than *Yorkshire*, and such a Spot, as if God had reserved it as a place only to dig Turf out of, for the accommodating those Countries wherein he hoards up the miseries of Winter, it affording naturally not any one Commodity of use; yet by Commerce and Trade (the Daughters of Industry) it is now become the Store-house of all those Merchandizes that may be collected from the rising to the setting of the Sun, and gives those People a Name as large and high as the greatest Monarch this day on Earth: Nor need we pass out of Christendom to find Examples of the like, when *Venice, Genoua, Lubeck, Embden*, and the rest of the *Hansiatick* Towns (once the Marts of the World, till Sloth, Luxury, and Ambition got within their Walls, and drove it to Ports of Industry) that have since kist and embraced it, the which this Isle, by the Influence of his Royal Majesty hath been no small sharer in.

Hence

To the READER.

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Hence it is, that Trade and Commerce are now become the only Object and Care of all Princes and Potentates, its Dominion not being acquired by the ruful Face of War, whose Footsteps leave behind them the deep Impression of Misery, Devastation and Poverty, they knowing the return of Commerce is Riches, and Plenty of all things conducing to the benefit of human Life, and fortifying their Countries with Reputation and Strength.

It was Trade that gave occasion to the bringing of those mighty Fleets to Sea, as if God had left it to them to decide by force (wherein no Age or Time can witness the like) the Empire of the World: Hence it was, (the advantages being found which arise by Commerce) that *Navigation* got its birth into the World, reducing the several Nations on the Earth by that means to be even as one Common Family; and when in this Isle we were even in the state of Canibals, it brought in a People that instructed us in Arts, Policies and Manners, and taught us Actions no less virtuous than those themselves followed: And although long and difficult it was before that mighty People could be brought over to have thoughts of the advantages arising from *Commerce* and *Navigation* (they only propounding to themselves Blood, Slaughter, Conquest, the Riches and Spoils of Nations;) but when they entred into the *Carthaginian* War, a quarrel with a People not worth the opposition of a Tribune (as they thought) but finding that neither Tribune nor Consul, nor nor the Flower of the Roman Army was able to withstand them, or to prevent the Invasion of their Country, and then in the very Bowels of the same, put it to the Question, *Rome* or *Carthage* Mistress of the World; they began to consider whence and from what causes those unknown *Africans* should withstand the

Anno 1665:
1672, 1673.

Camden?

*Quaestus omnis
indecorumpatri-
bus, says Livy.
lib. 1. Dec. 3.*

Though they had 100 ro-
strated Ships,
and 75 Gallies
under *Cajus
Drillman* and his
Colleague, as
Polybius ob-
serves.

the

To the R E A D E R.

* Now the important City of Tangier.

the *Conscript Fathers* and Power of *Rome*, and should dare to dispute with those that had led so many captivated Kings in Triumph, and brought so many Haughty Nations to truckle under their Victorious Eagles; at last they found it was *Commerce* and *Navigation* that gave power and force to that mighty People: Then it was that *Rome* began to know that *Rome could not be Rome without a Naval Force*; the which and to redeem their bleeding Honour, they soon hastned and equipt, great as their Competitors; afterwards *Argentum* being won, *Carthage* became no more impregnable; after which with Peace they plowed the Nighbouring Streights to *Tinges*, * *Gades*, and the *Herculean Streights*; nor could any thing be too difficult afterwards, till they arriv'd on the *British* Shore, where beholding her ample Bays, Harbours, Rivers, Shores and Stations (the Jewels and Ornaments of that Spot, and having made a Conquest of the same) they soon cultivated into our rude Natures the Spirit of *Commerce*, teaching and instructing us in those polite ways that fortifie a Kingdom by Naval Force, *as the Standard and undeniable Marks of Empire*, and by aiding and teaching us in the driving on a continued and peaceable Traffick of *Commerce*, we have fathom'd the unknown Depth of the *Indian* Shores, uniting, as it were, Extremes, made the Poles to kiss each other, teaching us thereby, that it was not the vast Immensities of Earth that created Empire, but Situation accompanied with *Industry, Commerce* and *Navigation*, that would enable a People to give Laws to the World: In the pursuit of whose Virtues, this Nation hath not been wanting, and of following their great Directions in the enlarging our Fleet; for they, when they advanced their *Eagles* on the *British* Shore, found us not then without Ships of Force, time
having

having not been so envious to this Island, as to eat out those Records wherein mention is made * that *Strabo, lib. 9.* the *Britains* accompanied the *Cymbrians* and *Gauls* in their memorable Expedition to *Greece*, long before the Incarnation of the World's Saviour; and it was from that Center that the mighty *Cesar* first drew his Line, and took thoughts of plowing the Ocean to find out that Warlike People to face his Victorious Legions; when having landed, and finding a Place adorned by Nature beyond any thing that could be called great, taught us to maintain the Superiority of Dominion, that no neighbouring Nation should frequent our peaceable Shores, and those Merchants that came, assigned them places to drive their Commerce and Traffick, *Gauls Town near Tarmouth the Mart for those Neighbouring Merchants.* jealous that any Neighbouring Rival should kiss his beloved *Britannia* but a *Roman*, and for whom he fetcht so long and tedious a March; thus in our Infancy teaching us both Defence and Commerce. And when that mighty Empire began to decline, and those remaining *Romans* began to moult and mix among the Natives, and to become as one People again, then Sloth, Luxury and Idleness (the Forerunners of Ruin) invaded our Shores by a fatal stupidity, it suffered our floating Castles (Bulwarks of the Kingdom) to rot in their neglected Brine, and our Ports to be surveyed by Foreign People; which supine negligence soon subjected us a prey to our ambitious Neighbours, who no sooner finished their Conquests, and sheath'd their devouring Swords, but each (as if inspired by the very *Abrahamus Wbelochus de priscis Anglorum legibus, written Originally by Mr. Lambard.* Genius of the place) equipt our Fleets great as their Competitors, to secure what they had so dearly won, of whom Story makes mention of the mighty *Arthur*, no less famous in his Warlike Atchievements, than in leading his Squadrons as far as *Iceland*, bringing those *Northern* People to pay ob-
b-y-fance

* Inserted in
Leges Edwardi
and after-
wards confir-
med by the
Norman Con-
queror.
Mr. Selden's
Mare Clausum,
lib. 2. cap. the
10. to the 16.

Matth Westm
Anno 1035.
fol. 409.
Selden's Mare
Clausum, lib.
2. cap. 11.

* *Coke 4. Inst.*
fol. 142.

beysance to his Victorious Standard, and acknow-
ledge him as their Supream Lord, even from the
British, to thee *Russian* Tracts, and by him left to
the famous *Edgar* *, who no sooner found his un-
doubted Right, but resolved to vindicate that Do-
minion which his Royal Predecessor had with so
much Glory acquired, and with so great Care com-
municated and remitted down to his Successor :
With no less a number than Four hundred Sail of
Ships did that mighty Prince at once cover the
Neighbouring Ocean, making them the *Portcallis*,
of this Isle and the adjacent Seas, by which he vin-
dicated his Dominions on the Waters, and gave
Laws in the Chambers of his Empire : Nor did his
Successors *Canutus* (whom Record makes mention,
that having laid that ancient Tribute, called *Dane-*
geld, for the guarding of the Seas, and Sovereignty
of them, was emblematically exprest, sitting on the
Shore in his Royal Chair, while the Sea was flowing,
speaking, *Tu Maræ ditionis es, & terra in qua*
sedeo etc, &c.) *Egbert*, *Althred*, *Ethelfred*, forget
the Assertion of their great Predecessors Dominion
and Sovereignty of the same, under no lower a stile,
than *Supreme Lords and Governours of the*
Ocean surrounding the British Shore, never so
much as contested by any Nation whatsoever, un-
less by those that attempted the Conquest of the
entire Empire, in which that became subject to
Fate as well as the other of the Land : Nor did
the succeeding Princes also of the *Norman* Race
start or wave that mighty advantage in their suc-
cessive Claims, and maintaining their Right to the
adjacent Sea ; as appeared not long after, by that
famous Accord, made between *Edward* the First,
and the *French King Philip the Fair*, calling * him
to an account for Piracies committed within the
British Seas, the Submission of the *Flemings* in
open

open Parliament in the Second *Edward's* Reign ;
 and the Honour or *Duty of the Flag*, which the
 politick King *John* had above Four hundred Years
 since challenged by that memorable Ordinance at
Hasting † there decreed to take place universally, † *Inter Leges*
 not barely as a *Civility*, but as a *Right*, to be *Marinas sub*
 paid *cum debita reverentia*, and Persons refusing, to *sine anni Regni*
 be assaulted and taken as Enemies; the same not *Regis Johannis*
 only to be paid to whole Fleets bearing the Royal
 standard, but to those Ships of Privilege that
 wear the Princes Ensigns or Colours of Service :
 Nor was this barely a Decree written, but nobly
 asserted by a *Fleet* of no less than 500 Sail in a
 Voyage Royal of his, wherein he sailed for *Ireland*,
 in his way commanding all Vessels which he met in
 the Eight circumfluent Seas to pay that Duty, and
 Acknowledgment. Nor was the Third *Edward*
 slow in following the steps of his wise Predecessors
 when he equipt out a *Fleet* of no less than 700
 (though on another occasion) with 200 of which
 he vanquished a *Fleet* of twice the number before
Salice, to the Loss of 30000 *French*. Nor did
 our Victorious Conqueror of the Sepulcher the
 great *Richard*, in his Return from the *Holy-Land*
 want a Navy Royal to attend him home, by the
 force of which, he took, and destroyed near 100
 more Ships of the *French*. And look we but into
 the mighty Actions of the succeeding Princes, we
 shall find that all that ever designed Empire were
 zealous in the Encouragement of Navigation, look-
 ing on that Axiom as undeniable, * *Qui Mare te-* * *Cic ad. Attic*
 * *t, eum necesse esse rerum potiri*, and that with- *l. 10. Ep. 7.*
 out which the *British* Sovereignty is but an empty
 title.

Nor ought alone the Praises of those great Mo-
 narchs, whose mighty care had always been to
 preserve the Reputation of their Empire in their
 Maritime

To the READER.

Born in Eng-
land, but resi-
dent at Genoa.

† Hen. 7.

campanel. Hist.
Hispan.

Maritime Preparations, to be remembred; but also those of our inhabitants, who always have been as industrious to follow the Encouragement of those Princes under whom they flourish'd, and who with no less Glory and timely application in Traffick, did constantly follow the Examples of those of *Genoa, Portugal, Spaniards, Castilians, and Venetians*, whose Fame in matters of Commerce ought to be enrolled in Letters of Gold, since the Ages to come, as well as present, having been doubly obliged to their Memory, the third of which making use of a discontented Native of this Isle, the Famous *Columbus*, who, prompted by that Genius that naturally follows a Native wise Man, discovered a New World, in whose Expedition he fathomed unknown Paths, and detected the *Antillus, Cuba and Jumaca, &c.* and the *Terra Firma* of the *American Shore*, who taking his Conjectures from the spiring of certain Winds from the *Western Points* by wrong impulse, accompanied with that Philosophy he attained to, concluded some Continent must needs be hid in those unknown Parts; his Service being first offered to his Prince, † and refused, he was soon after entertained, purely on the Faith of that noble Princess *Isabella* of *Spain*, who for 17000 Crowns (for which she engaged her *Jewels*) received not long after, as many Tuns of Treasure, and to her Husband's own use, in Eight or Nine Years time came above Fifteen Hundred Thousand of Silver, and Three Hundred and Sixty Tuns of Gold. Thus Ingenuity encouraged, though in one single Person, hath occasioned Wonders, and from a small Kingdom (as *Spain*) it hath since raised its Head, in a condition of bringing all those many Kingdoms, and vast Immensities of Earth which they possess, under their Protection; putting

putting them once on thoughts of no less than an
UNIVERSAL MONARCHY: We need only mention
Sebastion Chabot a Native of *Bristol*, who discovered
Florida and the Shores of *Virginia* dedicated to
that Virgin Princess *Elizabeth*; *Thorn*, *Elliot*, *Owen*,
Gwyned, *Hawkins*, *Cavendish*, *Furbisher*, *Davis*, *Stad-*
ton, *Raleigh*, and the incomparable *Drake*, who
was the first (agreed universally) of any Mortal
to whom God vouchsafed the stupendious Atchiev-
ment of incompassing not this New World alone,
but New and Old together, twice embraced by that
mighty Man, who first making up to *Nombre de*
Dios, got sight (with Tears of Joy) of the *South-*
ern Seas, the which in Five Years after, he accom-
plished, passing through the *Magellan Streights* to-
wards the other *Indies*, and doubling the famous Pro-
montory, he circumnavigated the whole Earth.

Nor ought that truly worthy Captain Sir *John*
Narborough be precluded from having place after
the mighty *Drake*, he having not long since passed
and repassed the *Magellan Streights*, by which that
worthy Person hath performed that Atchievement,
which was never done by any Mortal before.
To reckon up the particular Actions of *John Oxen-*
ham (a sharer in that mighty performance of *Drake*)
of his drawing his Vessel up to Land, and covering
the same with Boughs, passed the unknown Paths
of Land from *Nombre de Dios* to the *South Sea*,
and there building a Pinnacle, enters the Isle of
Pearls, and from the *Spaniards* takes a Treasure
almost beyond credit; of the undefatigable Dili-
gence of *Willoughby*, *Burroughs*, *Chanceler*, *Butson*,
Buffin, *Furbisher*, *James Middleton*, *Gilbert Cum-*
erland, who plowed up the *North-East* and *North-*
West Cathaian and *China Passage*; of *Jones* and *Smith*,
whose Fortune and Courage was great in those
parts; of *Poole*, who found the Whale Fish-
ing

To the *R E A D E R*.

ing; of Captain *Bennet* the first Discoverer of *Che-
ry-land*; of *Gillian* and of *Pett*, and *Fackman* that pas-
ted the *Vaigates*, *Seythian* Ices, and the River of
Ob, as far as *Nova Zembla*; nor of the Famous *Da-
vies* and *Wood*, who had penetrated to 86 Degrees
of Latitude, and almost set their Feet on the *Nor-
thern* Pole, and for truly valiant the Famous *Monk*,
Blake, *Lawson*, *Mines*, *Sandwich*, *Ossery*, and the
never-to-be-forgotten *Spragg*, and living his Royal
Highness *York's* Victorious Duke, and the brave
Rupert, Men whose Courage and Glorious Actions
as well in Battles as in the atchieving of Discove-
ries, and pointing out to places for an immense
Improvement in Navigation and Commerce, ought
to be inrolled in the Temple of Fame as Monu-
ments to succeeding Ages, of their mighty and la-
borious Travails and Industry. The Considerati-
on of all which give some sparks of Encourage-
ment to the Writing the ensuing Tract, especially
when reflecting, that among all Nations, there is
a Common Law which govern the mighty thing
of Navigation and Commerce; I had some Impul-
ses more than ordinary to induce me to the same,
especially at a time when Navigation and Com-
merce were never (from the Erection by Divine
Instinct that mighty Prototype, the Ark to this
present Age) in greater Esteem than now, and by
which we have found vast and great Easments and
Discharges from those Royal and just Rights and
Dues which now and of old were justly due to
those that govern'd this Empire; therefore ought
by all ways and means to be fortified and encou-
raged, be it by whatsoever Art, Science or Thing
that does in the least point out towards the same.
Nor was it then wanting in Thoughts to promote
and incite the Professors of the Law, raising and
stirring up their Genius to the advancement of the
Law

Law in this point ; and though I believe many have wisht that such a thing might be, yet none that I can find have ever yet attempted the same : nor is it possible, unless those things which are by Law *constituted and known*, be rightly separated from those that are *natural* ; for natural Law is immutably and always the same, therefore may easily be collected into Art. But things that come from Constitution, because they often vary and change, and are divers in divers Places, are put without Art, as other Precepts of Laws positive or municipal ; hence it was that the Constitutions and Laws of *Rhodes*, for their Justice and Equity, got footing amongst the *Romans* as well as amongst the bordering People on the *Mediterranean*, *rhodiorum usq; rerum memoriam disciplinae Navalis gloria remansit* ; yet when they, as well as the *Romans*, because subject to Fate, they then remained only as examples of Justice and Reason for others to imitate and follow : An obsequious Adorer of which was the great *Justinian*, who caused them to be inserted into the Civil Law ; and though they obtained a place amongst others of the Ancient *Romans* as well as the Modern, yet have they not all receiv'd any custom such a force as may make them Laws, but remain only as they have the Authority in shew of reason, which binds not always alike, but varies according to circumstances of Time, Place, State, Age, and what other conveniences or inconveniences meet with it ; nor have those Laws, instituted at *Oleron*, obtained any other or greater force than those of *Rhodes* or Imperial, considered only from the reason the which are not become Laws by any particular Custom

Manil. pro Orat. Leg.

And M. Serjeant *Calis* must be so understood of the ancient Civil and Modern *Roman* Law reduced into one, and they are not now two Laws, one Civil, and the other Imperial, but only one, that is, the Imperial. *Vide* his Reading on the Statute of Sewers, *Sett. 1. fol. 31.*

The Article of Enquiry annexed to them in 12 *Ed. 3.* The Inquisition at *Quins borough*, 49 *E. 3.* Anno 1375. Statutes of Enquiry translated by *Roughston.*

or Constitution, but only esteemed and valued by the reasons found in them, and applied to the case emergent.

'Tis true, that in *Rome* and some other parts of *Italy* and *Germany*, and the Kingdom of *Portugal*, in all those cases wherein the municipal Ordinances of those Countries have fail'd in providing, the Imperial Laws (if the case be such as that it *non Tragua peccado*, or be not spiritual) is there made of force; but there is no other Nation, State or Republick can be named, where any part of the Body of those Imperial Laws hath obtained the just force of a Law, otherwise than as Custom hath particularly induced it; and where no such settled Custom hath made it a Law, there it hath force only according to the strength of Reason and Circumstance joyned with it, or as it Shews the Opinion and Judgment of those that made it, but not at all as if it had any commanding Power of Obedience, that is, *valet pro ratione, non pro inducto jure* *pro ratione quantum Reges, Dynastæ & Reipublicæ intra potestatis suæ fines valere patiuntur*: And for *Spain* it is observed, *Hispani duplex habent, Jus, solum Canonicum scilicet & Regium; Civile enim* (meaning the Imperial Laws) *non habet vim Legis, sed rationis*. And since this Kingdom as well as most others, being free from all Subjection to the Empire, having constituted or known Law of its own, excludes all Imperial Power and Laws, otherwise than as Custom hath variously made some admission, I applied my self to the Collection of such matters, according to my inconsiderable Judgment, as are either constituted by the Supreme Authority of the Three Estates, or that which hath in some measure obtained by continued Custom from the force of Law in reference to matters Ma-

Selden's Titles
of Honour. lib.
ult. cap. ult.

ritim

To the READER.

xv

time and of Commerce, as well in Cases publick private.

By the first part of which I thought it necessary, to set the nature by Traffick hath made us all Kinsmen, to consider and examine upon what Grounds, and in what manner *Commerce* was first procured and established, which is by the Laws of Leagues, Embassies, and the like, which is a thing fit to be known; so likewise of what may interrupt the same, and likewise of those that have any reference to Seafaring Causes in Matters Civil.

In the prosecution of this Work, I have taken care to refer those things, which pertain to the *Laws of Nature*, unto Notions so certain, that no Man, without offering of Violence to himself, may deny them; and to ascertain the Truth of such, I have collected the Testimonies of such Authority (as in my weak Judgment are of Credit to evince the same;) and as to that Law, which we call the Law of Will,

Common Consent, or the Law of Nations, for that which cannot by sure consequence be deduced from sure Principles, and yet appears every where observed, must needs have its rise from free Will and Consent, which is that which is called the *Law of Nations*; both which (as much as possible) hath been endeavoured to be kept asunder where the Matter hath required it. And for the Civil Law, I have ascertained the several Authorities which I have made use of, that is, of the *Romans*, into three sorts, the *Pandects*, the *Code of Theodosius* and *Justinian*, the *Novel Constitutions*, and these most excellent *Jurisconsults* that have by their profoundness of Judgment illustrated the obscure parts of the same Law; the third those most excellent Persons who joyned Policy to Law, as *Gro-*

tius, *Raleigh*, *Bacon*, *Selden*, and the like. Other Pieces, that of *Shardius*, Entituled, *Leges Navales Rhodiorum & selecta Rhodiorum*, *Petrus Pekius*, the *Zealand*, *Locinius*, *Vinius*, that of *Oleron* collected by *Garafias* alias *Ferrand*, and *Cleriack*.

As to those Matters that have passed the Pike at the *Common Law*, I have as carefully as possible referred to their several Authorities. In the whole Work I have no where meddled with the *Admiralty* or its Jurisdiction (unless by the by, as incidentally falling in with other Matters) knowing well that

It is called *Imperium*, because it proceeds from the Authority of the Judge, and not from any right inherent in the party.

Leg. 1. §. de Const. Princip.
Coke lib. 10. fol. 73. in le
Case del Marshalsea.

would have been impertinent and sawcy in me to enter into the debate of *Imperium merum*, *Imperium mixtum*, *Jurisdictio simplex*, and the like, and of the bounding out of Jurisdiction which in effect tends to question the Government, and trip up the Power that gives Laws and Protection to us, since all this can be said, as well on the one Side as the other hath been so fully and learnedly handled and treated of by several worthy Persons, (that have indeed said all that can be said) but more especially that Famous Dispute not long since before His Sacred Majesty in Council, where all the most Elaborate and Ingenious Reasons that could be drawn by the Skill of a Learned Civilian, were there asserted in vindicating the Admiralties Jurisdiction by the Judge of the same, *Sir Leoline Jenkins*, in answer of whom was produced that Great Gentleman the Lord Chief Justice *Hales*, who as well by Law positive as other his great Reasons, for ever put a Period to that Question, which during many Days slept, and it may modestly be presumed will hardly (if ever) be awaked.

He that hath never so little to do with the Compass, though he sits still in his place, does as much or more than all the other necessary noise in the Ship; the comparison is quit of Arrogance, for it holdeth in the Design, it is not meant of the Performance.

And though I well know, That those that spend their time in brewing of Books, are by *Seneca* compared to petty Painters, that busie themselves in copying out Originals, having this half Verse of *Horace* often thrown in their Teeth,

——*O imitatores servum pecus!*

Yet I have this Hope left, That my Faults and Flaws, like those found in the Cuts of Diamonds, may at this time the easier escape under the excellency of their Subject, or at least under that of your Charity.

Charles Molloy.

T H E

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CHAP

CHAP. I.

Of Dominion or Property in general, and of the Causes changing the same by War.

Of Dominion in the Primitive state of Man.

That such a Dominion universal might have continued.

I. Of the Causes changing the same.

1. Of things excepted tacitly by the Law of Dominion.

2. Of Property where the same may be changed against the owner by War.

I. Of Publick War solemn or less solemn.

II. Solemn War, by whom to be undertaken.

III. Of an equitable Interpretation of the same in cases of necessity.

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That Justice is the very Basis that must support a War.

I. Justice what, and whether War is justifiable by the Laws of Nature to preserve the same.

II. Of War, and of the Ships and Goods of an Enemy, where the Property is changed by the Laws of Nature and of Nations.

III. Where the Property of Goods taken from an Enemy is qualified by the Law Civil.

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XVIII. Of the Goods of Friends found in the Ships of Enemies, and of those of Enemies found in the Ships of Friends, and where Property of the same is altered.

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XXI. Of Denunciation by the Custom of the Romans and other Nations, and whether requisite at this day.

XXII. War where proclaimed against any one, includes his Subjects and Adherents, but not as considered by themselves.

XXIII. The true Reason wherefore Indiction was introduced.

XXIV. Of the Goods of Friends that supply an Enemy, whether subject to be made Prize by the Laws of Nations.

XXV. How dealt withal after seizure, by the Practice of ancient and Modern Ages.

XXVI. Whether lawful for a Christian to assist an Infidel against a Christian by the Laws of Nations, and by our Religion.

NO sooner had the Eternal Power created Man, but he bestowed on him a Right over the things of this inferior Nature; nor was his goodness lessened upon the

A

Repara-

Justin, lib. 43. Reparation of the World after the Flood (*all things being then undivided and common to all, as if all had one Patri-
mony*) since every Man might then take to his use what he

A Theatre is common, yet in his own Eyes; which use of the universal Right was
the place pos- then instead of Property: for what any one had so taken,
sessed by any another could not without Injury take away from him.
one, may be
rightly called
his own. II. Nor was it impossible for that State to have conti-
nued, if Men through *great simplicity* or *mutual charity*

Justin lib. 2. ut
de Scythis lo-
quitur Trogus.
Primum inter
Homines mali
nescio, & adhuc
astutia inex-
perta simplici-
tas.

cans, who through many Ages have lived in that commu-
nity and custom; and the other of *Charity*, which the *Essai*
of old practised, and then the *Christians* who were first
at *Hierusalem*, and at this day not a few that lead an a-
scetick Life; the simplicity of our first Parents was de-
monstrated by their nakedness, there being in them rather
an ignorance of *Vice*, than a knowledge of *Vertue*, their only
Business being the Worship of God, living easily on those
things, which the Earth of her own accord brought forth
without labour.

Seneca Natura-
lium. 3. in fine.

III. Yet in this simple and innocent way of Life, all men
persisted not, but some apply'd their Minds to various
Arts; the most ancient of which was *Agriculture* and *Pa-
sture*, appearing in the first Brothers, not without some
distribution of Estates, and then from the diversity of each
Man's Actions arose *Emulation*, and then *slaughter*; and
at length, when the good were infected with the bad, a
Gigantick kind of Life, that is, *violent*; but the World be-
ing washed by the Flood, instead of that fierce Life, suc-
ceeded the desire of *Pleasure*, whereunto *Wine* was subser-
vient; and thence arose *unlawful Loves*, but by that more
generous vice *Ambition*, Concord was chiefly broken, after
which Men parted asunder, and severally possess'd several
parts of the Earth; yet afterwards, there remain'd a-
mongst Neighbours a communion not of Cattle, but of
Pastures, because in the small number of Men, so great
was the Latitude of Land, that without any incommodity
it might suffice to the uses of many, until the number of
Men, so of Cattle encreased, Lands every where began
to be divided; not among Nations as before, but among
Families; an instance of which we have hourly before
our Eyes in those vast immensities that are daily appro-
priating

Ne insignare
guidem aut
partire limite
campos Fas
erat.

appropriating and planting in *America*, from hence we learn what was the cause for which Men departed from the primitive communion of things, first of *moveables*, and then of *immoveables* also; to wit, because when not content to feed upon that which grew of it self, and the Earth singly brought forth, to dwell in *Caves*, to go naked, or clad with *skins of Trees*, or *skins of Beasts*; they had chosen a more exquisite kind of Life, there was need of Industry, and using of Art in those matters, which they should give themselves up to; so likewise from hence we learn, that Men not content to live in that innocent state of community, how things went into Property, not only by the act of the Mind (for they could not know the thoughts of one another, what every one would have to be his own, that they might abstain from it, and many might desire the same thing) but by a certain Covenant; either expressed by division, or tacit as by occupation, for so soon as Communion did not please them, and division was not made, it ought to be supposed an agreement amongst all, that every one should have proper to himself what he seized on, * for every one might prefer himself before another, in getting those things useful for the accommodating of Human life, Nature not being repugnant to the same.

Bodin. lib. 3.
cap. 7.

Grotius de Ma-
ri libero cap.
13.

* Cic. offic. 11
Addendum il-
lud Quintilia-
ni; Si hæc con-

ratio est, ut quicquid in usum hominis cessit, proprium sit habentis, profecto quicquid jure
assidetur, injuria auferatur. Macrobius Saturn. l. 3. c. 12.

IV. And though Property may seem to have swallow'd up all that right which arose from the common state of things, yet that is not so; for in the Law of Dominion, extreme necessities seem excepted. Hence it is that in Navigation, if at any time Victuals fail, what every one hath, ought to be brought forth for the common use: and so in a Fire, I may pull down or blow up my Neighbour's House to save mine; destroy the Suburbs, to raise Lines or Forts to preserve the City thereby; dig in any Man's Grounds for Salt Peter, cut in pieces the Tackling Nets upon which my Ship is driven, if it cannot be disentangled by other means: all which are not introduced neither by the Civil Law, nor the Municipal Laws of Countries, but are expounded by them, with their proper diversities.

Leg. 2. §. cum
in eadem D. ad
Leg. Rhodani.
Quoniam fragm.
§. Quod ait.
D. incend. Leg.
Quemadmodum
§. item. D. ad
l. Aquilam.

Ed. 3. tit. distress. 170. 11 H. 7. 5. Reniger & Fogassas, Plowden fol. 1. 30
10. Coke 3 Instit. fol. 83.

Eald. lib. 3. de rerum diversarum, seems to have been of opinion, that V. Nor is Property so far inflated in Man, but the same may again be divested by such means as stand with the Law of Nature and Nations; and first by War, the Causes of which are assigned to be three, Defence, Recovery, by the Laws and Revenge.

of Nations

one may take Arms to abate the growing Power of his Neighbours. *Sed ut vim pati posse ad vim inferendam Jus triuat, ab omni equitatis ratione abhorret*: But that possibility of suffering Force, should give a right of offering of Force, this is far from all equity, says the excellent *Grotius lib. 2. cap. 1. sect. 27.* Sir Walter Raleigh in *Hist. of the World, cap. of Duels fol. 550.* *Grot. de jure belli & pacis 3. c. 6. Sili.*

11, 12, 13, 14.

But then such War must be just, and he that undertakes it must be a Sovereign: the just causes to make a War are our Prince's or Country's defence, and that of our Allies, the Satisfaction of our Injuries, or theirs; our just Pretensions to an Estate or Right; Divines have added another, not only the Defence of Religion, but its Advancement and Propagation, by the way of Arms, and some the extirpation and rooting up a contrary. Certainly War is too rough a Hand, too bad a Means, to plant Piety; *Sicut non Martyrem pœna, sic nec fortem pugna, sed causa*; *it is not the punishment that makes the Martyr, so it is not fighting that declares a valiant Man, but fighting in a just cause*; in which whoso shall resolvedly end his Life valiantly, in respect of the cause, that is, in the Defence of his Prince, Religion, or Country, ought to be numbred amongst the Martyrs of God.

Ita inter cives erant quedam matrimonia non justa, non iusti liberi. Paul. Sent. lib. 2. tit. 19.

VI. Publick War is either Solemn by the Laws of Nations, or else less Solemn. What we here call Solemn is commonly call'd Just, in the same sense as a just Testament is opposed to Codicils, not that it is not lawful for him that pleases to make Codicils, but because a Solemn Testament hath by the Civil Law some peculiar effects, and this difference is worth Observation, seeing many misunderstand the Word *Just* conceive all Wars to be condemn'd as unjust and unlawful, whereunto this Appellation of Just is not agreeable.

VII. That War, according to the Law of Nations, may be Solemn, two things are requisite: First, That it be waged on both sides by his Authority who hath the highest Power in the Commonwealth. Secondly, That certain Rights be used (of which we shall speak in due place) on

of these without the other (because they are both required) doth not suffice. Publick War less Solemn may want those Rites, and be waged against private Persons, and have for the Author any Magistrate. And according to the opinion of most Civilians, if the matter be considered without Civil Laws, it seemeth that every Magistrate hath right to wage War, as for the defence of the People committed to his Charge, so for the Exercise of Jurisdiction, if he be opposed by Force: But because by War the whole Commonwealth is endangered; therefore by the Laws of all Nations that War be not undertaken without the Authority of him whose Power in the Commonwealth is the highest, there is extant such a Law of Plato's, and in the Roman Law it is called Treason in him who, without the Command of the Prince, hath waged War, or lifted Soldiers, or raised an Army; in the Cornelian Law brought in by L. Cornelius Sylla it was, *without the Command of the People*; in Justinian's Code is extant a Constitution of Valentinian and Valens, *None have leave to take any Arms without our knowledge and direction.* And my Lord Coke in his Third Institutes observes, That by the Common Law of this Realm it was High-Treason to levy War without Authority from the King, for to him it belongeth only. And the reason why it should be so subjected is, because that natural Order for preserving of peace among Men requires that an Authority and Council in undertaking of War should remain in Princes.

VIII. But as all Laws must be interpreted by Equity, so must this Law; and therefore there is no Question but that 'tis lawful for one having Jurisdiction by force of those which we call a peaceable Guard or Power, viz. Constable, Serjeants, Watch men, &c. to constrain a few disobedient Persons as oft as there's no need of greater Power to that purpose, and no eminent danger to the Commonwealth. Again, if it be so present a danger, that time will not admit of Consultation with him who hath Supreme Power, there also necessity affordeth another Exception; and therefore in Garrisons, if the Townsmen should endeavour to fall over to an Enemy, they may be dealt withal as Enemies by the Governour of the Garrison, and by that Right L. Pinarius Governour of Enna, a Garrison in Sicily, having information that the Townsmen were falling

Ult. de Leg. l. 3.
D. ad leg. Jul.
maj.

Ful. 9 Le Roi doit
de droit s'avoir
& de fender son
Realm vers E-
nemies, &c.
Fitz. Herb.
Nat. Bre. fo.
113. a

off to the *Carthaginians*, making slaughter of them kept the Town : and the reason why such extraordinary Force is called War, is, for that the same is commenced by the right of the Magistrate, in which case the War is suppos'd to be made by the highest Power, because every one is judg'd Author of that which he giveth another Commission to do ; besides the universal reason which warrants the act, which requires that all Dangers, Rebellions, and Insurrections be withstood and checkt in the very bud, and tho' this is called War, yet this strictly is not properly War, tho' the Parties who suppress or punish are impune.

IX. But War properly by the Laws of this Realm or *Solemn*, is, when the Courts of Justice are shut up, and the Judges and Ministers of the same cannot protect Men from violence, nor distribute Justice: so when by *Invasion*, *Insurrection*, *Rebellion*, or the like, the current of Justice is stoppt and shut up, *Et silent leges inter arma*, then it is said to be time of War, and the Trial of this is by Records and Judges of the Court of Justice, and not by a Jury. So likewise War by the Laws of *England* is when the King's Standard and Host enter the Realm of another Prince or State, and hath been there by the space of Forty Days, for till then the War is not properly said begun.

X. Wars, though undertaken by publick Authority, must have the Effects of Law, that is, there must be a just cause for the undertaking the same ; so that *Alexander*, if that without cause he warred upon the *Persians* and other Nations, is by the *Scythians* in *Curtius* and by *Seneca* too deservedly call'd a Robber. For take away Justice, and what are Kingdoms but great Robberies ? Therefore the just cause of taking Arms must be the Iniquity, or as we understand it, the Injury of the adverse Party, according to the Words used in the ancient Denunciation of the Roman Heralds, * *I call you to witness, that People is unjust, and doth not perform what is Right*. Now that is unjust which hath a necessary repugnance to the rational and social nature. Now amongst the first principles of Nature there is nothing necessarily repugnant to War, there is much in favour of it ; for both the end of War, the conservation of Life and Members, and the keeping or acquiring of things useful unto Life is most agreeable unto those Principles ; and if need be, to use Force to that purpose

14. Ed. 3. tit.

Scire facias

122, inter Mortimer and the Earl of Lancaster.

Trin. 7 Ed. 3.

fol. 29.

Gros. de jure

belli et pa. lib.

2. c. 1. §. 1.

Seneca de bene-

fic. 1. c. 13.

* *Ego vos testor, Populum illum injustum esse, neque jus persolvere.*

urpose is not disagreeable, since every thing hath by the
 gift of Nature strength, to the end it may be able to de-
 fend and help it self, and therefore *he is by Nature fitted for
 Peace and War; though coming into the World unarmed, yet he
 hath a Hand fit to provide and handle Arms,* the which we
 daily see Children of their own accord, without a Teacher,
 make use of for a Weapon. Moreover right Reason and
 the Nature of Society inhibits not all Force, but what is
 repugnant to Society, that is, which depriveth another of
 his Right; for the end of Society is, that by mutual Aid
 every one may enjoy his own. And this were so, although
 the Dominion and Propriety of Possessions had not been
 introduced; for life, members, liberty would yet be pro-
 per to every one, and therefore could not without Injury
 be invaded by another, and to make use of what is com-
 mon, and to spend as much as may suffice Nature, would
 be the right of the occupant, which right none without
 injury could take away; and that is made evident, since
 by Law and Use Dominion is establish'd, and that appears
 by the Orator, *Ut si unumquodque membrum sensum suum* Tully's Offic. 3.
*haberet, ut posse putaret se valere si proximi membri valetudinem
 se traduxisset, debilitari & interire totum corpus necesse est:*
 and applying that, says, So if every one of us snatch unto him-
 self the commodities of other Men, and draw away from every one
 what he can to advantage himself, humane Society cannot stand,
 Nature gives leave to every Man, in the acquisition of things useful,
 to supply himself before another: But by the Spoils of another to
 increase his own Store, that Nature doth not permit. It is not
 then against Society to provide for one's self, so that
 another's right be not diminished; nor is that violence
 unjust which doth not violate the Right of another. Of
 the two kinds, Contention by debate and by force, the
 one agreeing to Men, the other more becoming Beasts,
 we must fly unto the latter when the former will not serve.
 The incomparable Ulpian says, *Cassius writes that it is by* Leg. 1. sec.
Nature lawful to repel Force by Force, and Arms by Arms. And this *vim vi. D. de*
 is further proved out of Sacred History; for when Abraham *vi. & vi. ar-*
 having armed his Servants and Friends, pursued the Four *ma. a.*
 Kings that spoil'd Sodom, and returned with Victory and
 spoil of the Enemy, God by his Priest Melchisedeck ap-
 proved his Action, *Blessed be the most High God,* said Mel- Gen. 14. 18.
chisedeck, who hath delivered thine Enemies into thine Hand.

Abraham, as appears by the Story, had taken Arms without any special Commission from God; therefore the Law of Nature was his Warrant, whose Wisdom was no less eminent than his Sanctity; nay, God himself hath prescribed to his People general and perpetual Laws of waging War, thereby shewing that Wars may be Just, even without his special Mandate; for he doth plainly distinguish the Cause of the seven Nations (in which God gave a special Mandate for the destroying of them, which is properly called the Wars of God, and not of humane Counsel) from the cause of other People, and prescribing nothing about the just Causes of entering into War, thereby shews them to be manifest enough by the Light of Nature, as the cause of the defending of the Frontiers in the Wars of *Jephtha* against the *Ammonites*, and the cause of Ambassadors violated in the Wars of *David* against the same.

XIII. By the Law of Nature in War those things are acquired to us, which are either equal to that, which being due unto us, we cannot otherwise obtain, or else is such a mark as does infer Damage to the guilty Party by a fit measure of Punishment; and by the Laws of Nations, not only he that wages War on a just Cause, but every one in solemn War, and without end and measure, is Master of all he taketh from the Enemy in that Sense, that by all Nations, both himself and they that have Title from him, are to be maintained in the Possession of them; which as to external Effect we may call Dominion; *Cyrus in Xenophon, it is an everlasting Law among Men, that the Enemies City being taken, their Goods and Money should be the Conquerors*; for the Law in that matter is as a common Agreement, whereby the things taken in War become the Takers. From the Enemy are judged to be taken away those things also which are taken away from the Subjects of the Enemy, and Goods so taken cannot by the Law of Nations be properly said taken; but when the same are out of all probable hopes of recovery, that is, as *Pomponius* observes, brought within the bounds or guards of the Enemy; For says he, such is a Person taken in War, whom the Enemies have taken out of our, and brought within their Guards, for till then he remains a Citizen. And as the Law of Nations is the same reason of a Man, so likewise of a thing; and therefore Goods and Merchandise

*Xenoph. 5. de
Pist. Cyri.
Arist 1. Polit.*

*Hujusmodi res
non tam capta
quam recepta
intelligitur, per
D. per Pompo-
nius & Leg in
Bello Parag. Si
quis servum in
pr. de capt. &
post.*

dize

are properly said to be the Captors, when they are carried *Infra Præsidia* of that Prince or State, by whose Subjects the same were taken, or into the Fleet, or into a haven, or some other place where the Navy of the Enemy lies: For then it is that the recovery seems to be past hope. And therefore the common Law of this Realm holds such a taking a *Legalis Captio in Fure Belli*, and in R. 2. an Action of Trespass was brought for a Ship, and certain Merchandize taken away, the Defendant pleaded that he did take them in *le haut Mer ou les mers queux sont Enemies le Roy*: and it was adjudged that the same Plea was good. And, in the Year 1610. a Merchant had a Ship and Merchandize taken by a Spanish Ship, being an Enemy; a Month after a Merchant Man, with a Ship called *The little Richard*, retakes her from the Spaniard: It was adjudged, that such a possession of the Enemy, divested the Owner of his Interest, and the retaking afterwards in *Battel*, gained the Captors a Property.

XIII. 'Tis true, the Civilians do hold, That it is not every Possession that qualifies such a Caption, and makes become the Captor's; but a firm possession (that is) when the Prize doth *pernoctare* with the Enemy, or remain in his possession by the space of 24 Hours; but as this is a new Law, so it is conceived to be against the ancient Arguments of the Civil Law, as well as the modern Practice of the common Law: for the Party in the ancient Decedents doth not mention by their Plea, that the Prize did *pernoctare* with the Enemy, but general, that the same was gained by *Battel* of the Enemy.

XIV. This right of changing of Dominion or Property by force of Arms, is so odious, that in the taking of Goods, by any possibility the right Owners may have restitution, the same hath been done. And although a larger time than 24 hours happens between the capture and restitution, and so may *pernoctare* with the Captor, yet restitution may be made; and therefore if one Enemy takes a Ship and Merchandize of another Enemy, and brings her into the Ports or Havens of a Neuter Nation, the Owner may seize her, and the Admiral of that Neuter Nation may in some cases restore the Ship and Goods to their former Owners, and the Persons captive to their former liberty;

the

2 R. 3. fol. 3.
7 R. 2. Trespass Statute
Pl. 54.

M. 8. Jac. in
B. R. Bromp-
low 2 part in
Westons C. 11.
7. Ed. 4. 14.
a. 24. Ed. 3.
16, 17.

Consulatus
Moris c. 183.
287. Consil.
Gallice lib. 20.
tit. 13. art.
24.

7 R. 2. Trespass Statute
Pl. 54.

(a) *Res quæ intra præsidia perductæ nondum sunt, quam ab hostibus occupatæ, Dominum non mutarunt ex Gentium jure. Grotius de jure Belli ac Pacis, l. 3. c. 9. §. 16.*
 (b) *Trin. 17. Car. i. in B. R. March's Reports 110.*

the reason is, for that the same ought to have been brought *infra Præsidia* (a) of that Prince or State by whose Subject she was taken.

A *Dunkirker* having seiz'd a *Frenchman's Vessel*, *super tum Mare*, sold the same with her lading at *Weymouth* whither it had been driven before she was brought in *Præsid. Dom. Reg. Hispaniæ*: The *Frenchman* coming in Port, there claims the benefit of the Laws of Nations, the King of *England* being then in amity with both the Princes, and that restitution be made; in which case it was resolved by all the Judges (b) That if there be Caption by Letters of *Marq*, or by *Piracy*, and the Vessel and Goods are not brought *infra Præsidia* of that Prince or State, by whose Subject the same was taken, the same will not divest the Property out of the Owner; which agrees the Law Civil, and restitution may be made. For this is not an absolute property immediately vested in the Captor upon the taking; but a conditional property to answer the original Debt or Damage, which cannot be done without a judicial Adjudication, the opportunity of which he hath lost by bringing the Prize into the Country of another Prince: for as to private War, their Countries are as an Asylum.

Per leg. libertas, & de leg. Jur.

1 Ro. Rep. 175. Bullstro. 3. part. fol. 28. cited in Case. The getting of Letters of Reprisal against a Nation, does not make a War between both States; nor can they be said to be at Enmity.

22 E 3. fol. 13. Coram Rege & Concilio suo

XV. But if the Ships of War of Nations in enmity meet at Sea, and there be a caption, if there be that which is called a *firm possession*, the *Neuter Nation* cannot redeliver or make restitution of the thing so acquired: and if it was adjudged, where *Samuel Pellagii* with a Ship of War of the Emperor of *Morocco*, took a *Spanish Ship*, which he brought the same into *England*, that he could not be questioned for the same *criminaliter*, or restitution be made *civiliter*; for that the King of *Spain* and the *Morocco* Emperor were Enemies, and the King of *England* in Amity with both, and that such a caption is not called *Spoliatio, sed legalis captio*, in which there can be no restitution made, upon neither of the Statutes of 31 Hen. 6. cap. 4. or 27 Ed. 3. cap. 13. for he that will sue to have restitution in *England* for Goods taken at Sea, must prove That the Sovereign of the Party was in amity with the King of *England*. Secondly, That he that took the Goods, or Prince was at the time of the taking in amity with the Sovereign of him whose Goods were taken. For if he which

was in enmity with the Sovereign of him whose Goods were taken, then the same will not amount unto depredation or robbery, but a lawful taking, as even an enemy might take of another.

A Spanish Merchant, before the King and his Council, Camera Scaccarii, brought a Bill against divers Englishmen wherein setting forth *quod deprædatus & spoliatus fuit* upon the Sea, *juxta partes Britanniae per quendam Virum* *cosum de Britannia, de quadam Navi*, and of divers merchandizes therein, which were brought into England and came into the hands of divers Englishmen, naming them, and so prayed process against them, who came in, and pleaded, that in regard this depredation was done by a Stranger, and not by the Subjects of the Kingdom of England, they ought not to answer. It was thereupon resolved, *Quod quisquis extraneus*, who brings his Goods upon this Statute to have restitution, *debet probare* *tempore captionis fuit de amicitia Domini Regis*; and *quod ipse qui eum ceperit, & spoliavit, fuit etiam sub* *sentia Regis, vel de amicitia Domini Regis, sive Principis* *querentis, tempore spoliationis, & non Inimicus Domini Regis,* *Principis querentis: quia si fuerit inimicus, & sic ceperit bona,* *non fuit spoliatio, nec deprædatio, sed legalis captio, prout* *et inimicus capit super unum & alterum.*

But if the King of England is in enmity with the States of Holland, and one of their Ships of War takes a Merchant-Man of the King of England's, and afterwards another Ship of War of England meets the Dutchman and captures him, and in aperto prælio, regains the prize, there restitution is commonly made, the Owners paying the value: so where the prize is recovered by a Friend in Goods, or comes into his Ports, restitution is likewise made; but when such Goods become a lawful and just Prize to the Captor, then should the Admiral have a share; following the religious example of Abraham, after his Victory over the five Kings.

See Cole, vers. Claxton, Hill. 26, & 27 Car. 2 in B. R. Restitution made for a French-Man, who had regained an English prize out of the Hands of a Man of War.

I. He that is an Enemy, may every where be attacked, according to the Laws of Nations. Enemies may

Camera Scaccarii Michaelm
2 R. 3. fol. 2. A.

7 E. 4. 14.
13 E. 4. 9.
22 E. 3. fol. 23.
2 R. 3 fol. 2.

27 E. 3. c. 13.
31 H. 6. c. 4.
3 Bul. 28.
1 Ro. Rep. 175.

Hujusmodi res
non tam capta,
quam recepta
intelligitur: per
D. Leg. Pompo-
nius. & per Leg.
in Bello Par. si
quis servum in
pr. de Cap. &
post.

Per Leg. postlimi-
nio, Par.
Postliminio. de
Capt. & postli.

Sir Walter
Raleigh l. 5. c.
3. S. 17.

History of the
Republick of
Venice in Anno
1638. and fol.
447.

Fuller's Holy
War, l. 4. c. 23.

may therefore be attacked or slain on our Ground, our Enemies, or on the Sea ; but to assault, kill, or spurn him in a *Haven* or *peaceable Port*, is not lawful ; that proceeds not from their Persons, but from his right that hath *Empire* there, for Civil Societies have provided that no force be used in their Countries against Men, but that of Law, and where that is open, the right of hurting ceaseth. The *Carthaginian Fleet* was at Anchor in *Syphax Port*, who at that time was at peace with the *Romans* and *Carthaginians* ; *Scipio* unawares fell into the same *Haven*, the *Carthaginian Fleet* being the strongest might easily have destroyed the *Romans* ; but yet they durst not fight them. The like did the *Venetian*, who hindered the *Greeks* from assaulting the *Turkish Fleet*, who lay at Anchor in a *Haven*, then under the Government of that *Republick* ; so when the *Venetian* and *Turkish* Fleets met at *Tunis*, though that very Port acknowledges the *Ottoman* Emperour ; yet in regard they are in the nature of a *Free Port* to themselves, and those that come thither they would provide for the peace of the same, and interdicted any Hostile Attempt to be made there.

The *Corfaires* having been in the *Gulph*, put into the Port of *Vallona*, which is subject to the Turk : where on *Capello*, Proveditor-General for the *Venetian*, and Captain of the *Gulph*, having notice of the same, met into the Port ; and though the *Ottoman* Port had a Treaty permitted the *Venetian* to pursue the Pirates in all Places, and forbad their Commanders to protect or shew them any Favour, yet the Castle interdicted, and forbad the *Venetian* General with Cannon to attack them ; for it was nevertheless intended by the Treaty that the Peace of Ports must be preserved.

And the same *Republick* having War with those of *Genoa*, met at *Tyre*, *Reinerius Zenus* Duke of *Venice* with the united power of the *Venetians* and *Pisans*, counted no fewer Number than 74 Vessels well provided, who would have engaged in the very *Haven*, but were they interdicted by the Governour ; but yet with this proviso, that if by consent they would go out of the protection of the Port, and at open Sea decide the cause they had then freedom : And accordingly they sailed forth and engaged. The like not long since happened

between *Cornelius de Wit* Commander of a Ship of War of the *States General*, and Captain *Harman*, Commander of His Majesty's Frigates at *Cales*, a Challenge being made in that Port by the first, and as briskly accepted by the latter, but both were interdicted the execution of the same in the Port, but out of the prohibition of the same they might decide the Question; *Jun. An. 1672* which they did to the no small Fame of the last; in that dispute, of 380 Men then aboard the *States* of War there were scarce 100 whole Men in her, *Harman* having entred and taken her, brought her to his Stern in Triumph to the Port again. But they of *Hamborough* were not so kind to the *English* when the *Dutch Fleet* fell into their Road, where rid the same time some *English Merchant Men*, whom they *Anno 1665,* *1666. Bell.* *Angl. cum Batav.* *This is Jus belli, & in Re publica maxime confer-* *vanda sunt Jura Belli. Reg. fol 129. Arrest fact super bonis Mercator, alienig.* *Grot. de Jura belli & pacis lib. 3. c. 11. Sect. 12.* *Some of old have held that Clericus, Agricola & Mercator tempore belli ut colat com- miter, oresq; pace fruuntur Co. 2. Instit. fol. 58.* *I think have paid most or all of it since. But Enemies in their own Ports may be assaulted, burnt or destroyed by the Laws of Arms.*

XVII. If the Ships of any Nation happen to arrive in the Ports of the King of *England*, and afterwards, and before their departure a War breaks out, they may be seized, privileged without harm of Body or Goods; under this limitation, till it be known to the King, by the Prince or Republick of those, whose Subjects the Parties are, have used and treated those of our Nation in their Ports. But if any should be so bold as to visit our Ports after a War is begun, they are to be dealt with as Enemies.

XVIII. By the Laws of Nations generally all things taken by the Captor's which he takes from his Enemy, or which his Enemies gained from another by Force of Arms; so likewise all those Goods that he shall find in the Enemies custody: but then it must be apparently manifest, and evidently proved, that it is really the Enemy's; for if an *English-Man* should have Goods in the custody of a *Dutch Factor* at *Cales*, and a War should break

Consul. Marit.
c. 273.

*Hostis sit ille,
& qui intra
presidia ejus
sunt: Let him
be our Ene-
my, and they
that are with
in his Guards.
Liv. lib. 37. &
alibi passim.*

Gregor. lib. 9.

*Romani nos ho-
nestissimas eas
asque justissi-*

*mas credimus possessiones quas Belli Lege captas habemus; neque verò induci possunt
fulta facilitate deleamus virtutis monumenta, si eas illis reddamus, quibus semel per-
runt: imò vero tales possessiones, non tantum cum his qui nunc vivunt civibus nostris
municandas; sed & posteris relinquendas censemus: tantum abest ut partem relinquamus
nos ipsos ea constituamus, quæ in Hostes constitui solent: Titus Lægius his opinio-*

*the Senate of Restitution: We Romans believe those possessions to be most Honour-
able and just, which we have taken by the Law of War; nor can we be in-*

break out between that Prince and that Republick, are not the Goods of the English-Man subject to the sure of the Spaniard, it being apparent, that the owner is not a Subject of their Enemies; So likewise if Goods of Friends are found in the Ships of Enemies, does not ipso facto subject the same to be prize by Laws of Nations; though it be a violent presumption and may justly bear a legal examination, till which time may be a securing of the prize, till adjudication shall pass. So on the other hand, if the Ships of Friends shall be freighted out to carry the Goods of Enemies, this may subject them to be prize, especially if the Goods shall be laden aboard by the consent or privy of the Master or Skipper; though in France they have subjected and involved the innocent with the nocent, and made both of them prize. In the late Flemish Wars with England the Officers became obsequious serviceable with their Ships to the Traffick and Commerce of both Nations. Memorable was the Action, when the War was between the Republicks, Venice and Genoa, the Grecian Ships being then employed, (as those of Ostend) were searched and the Enemies pulled out, but no other matter done; however it is most certain, let the Commission or Protection of such Ships be what they will, if Men will venture to trade under such a Cloak, it behoves them, that the Skipper and his Crew be entirely ignorant; for it is an action that will go far in the freeing, or making absolute the prize, and Goods so made prize, the property immediately gone and changed, be the Owner who will, he never can claim the same; for the Laws of Nations made the Enemies first Masters by External Denon, and then by Conquest gave the property to the Captains following that Judgment of the Romans, Whatsoever they got of their Enemies by Valour, they would transmit to Posterity by Right.

by a foolish Facility to part with the Monuments of our Valour, and restore to those that were not able to keep them; nor do we judge such possessions communicated only to our Country-men now living, but to be left to our posterity. So far are we from relinquishing what we have got, and dealing with ourselves, as if we were our own Enemies. *De Veij. idem in Romulo narrat Plautus*

XIX. 'Tis not against nature to spoil the Goods of *whom it is lawful to kill*; and by the Laws of Nature it is permitted that the Goods of Enemies may be well spoiled as taken; and Polybius observes, That things of the Enemies may be spoil'd, their Ships, Goods, Forts, &c.

Hist. 5.

Grot. de jure Belli & pacis lib. 3. c. 12.

§. 1.

X. And though it may happen sometimes that a War may break out, and there may be no publick denouncing or proclaiming the same; that if a Friend or Ally should assist an Enemy with *Contraband Goods*, that Arms, &c. whether upon such a caption the Goods may be made prize; the resolution of which will depend upon these Considerations.

3 Eliz. in C.B. Owen's Report, fol. 45. but quare of that Case.

First, By natural Law, *where either force offered, is repaid, or punishment exacted of one that hath offended, and is requited*, there needs no denunciation; for Princes are not wont to stand debating with Words and Arguments, being engaged beyond Words: *For War undertaken to resist violence is proclaimed not by an Herald, but by Nature*: for it is more than the invading of one for another, or taking of the Goods of the Debtor, to answer the Creditor's damage.

Grotius lib. 3. cap. 3. § 2, 3.

Secondly, *Interpellation* is introduced by the Laws of Nations, whereby Princes or Republicks having received injuries, may apparently shew that they had no other way to recover their own, or that which is due to them: for such *Interpellation* following after injuries committed, constitutes that Prince or State in a fault that *may not render satisfaction*.

Vid. Marianam 27. 13.

Thirdly, Admitting that *Interpellation* hath gone, and satisfaction hath been required for the damage, and no satisfactory return hath been made, whether then the Ports or Territories of the Enemy may be assaulted: and that it has been conceived they may, for denunciation is no more but to signify that the parties, against whom the same is commenced, are unjust and will not do right,

Denunciation is either conditionate or pure: Conditionate where it is joyned with remanding of things, and in the

an Indiction or Proclamation, which is either when the other Party hath already begun the War, or when he himself hath committed that which deserves to be punished. See *Examples Grot. lib. 3. c. 3. 8. 7.*

the third Punick War was once indicted and

planibæus Arma Suecica fol. 13. 37. Zouch de Jure Fœdiali part. 2. sect. 10. qu. An illum aliquando omiffa indictione movere liceat?

gun. Varro lib. 4 de l. Phil. fect. 10. qu. An

XXII. But if War be indicted, or is begun against him who hath the highest Power over the People, it is supposed to be proclaimed against all his, not only Subjects, but those who will join themselves unto him, as being an accession to his party. And this is that which the Law interprets, *the Prince being defied, his adherents so are defied*; for to proclaim a War is to defie, which is to be understood of that same War which is waged against him to whom it is indicted, as when War was denounced against *Antiochus*, they were not pleased to denounce it against the *Ætolians* apart because they had only joined themselves with *Antiochus*: the Heralds answered, *Ætolians have declared War of their own accord against themselves*; but that War being ended, if another people or King, for supply of Aids, is to be warred against, that the effects of the Laws of Nations may follow, there will be need of a new Indiction, for now he is not lookt upon as accessory, but Principal: wherefore it is rightly said, That by the Law of Nations, neither the War of *Manlius* upon the *Gallo-Greeks*, nor of *Cæsar* upon *Ariovistus* was lawful. For they were not assaulted now as an accession of a Neighbour's War, but principally: to which purpose, as by the Law of Nations is indicted, so by the Roman Law a new Command of the Roman people was necessary. For what was said in the proposal against *Antiochus*: *was it their will that War should be entred with King Antiochus and those that followed his Party* (which was observed also in the Decree against King *Perseus*) seems truly understood so long as the War continued with King *Antiochus* or *Perseus*, and those that really immixed themselves in that War.

Diffidato Principe; diffidat sunt ejus adherentes. Baldus ad Leg. 2. C. de Serv. n. 70.

Liv. lib. 36.

Idem dici potest de bello sociorum Ulyssis in Cyconas Priamo quondam auxiliator, de quibus Hom. Odyss. 1 & ibi Didymus.

Livius lib. 36. 42.

XXIII. Now the true Reason wherefore Nations required Denunciation to that War which was said to be by the Law of Nations, was not that Force should be offered privily, or carried on by deceit, for that per-

tains more to the excellency of their Valour than to the Right; (for some Nations (as we have read) have appointed their Enemy the time and place of Battle) but that it might certainly appear the War was not waged by a private undertaking, but by the will of either people or their Heads. *Servius Honoratus* when he had produced the Original of the Heralds Law from *Ancus Marcius*, and further from the *Aequicola*, saith, *That if at any time Men or Beasts were by any Nation taken from the people of Rome, the Pater Patratus went with the Heralds (that is, Priests) who have Authority in making Leagues and standing before the Bounds, with a loud voice pronounced the cause of the War; and if they would not restore the things taken, or deliver up the Authors of the Injury, he threw a Spear, which was the beginning of the fight, and then forth it was lawful, after the manner of War, to take the Spoil.*

*Turn certare o-
diis, cum res
rapuisse licebit.*

XXIV. War is not only lawful against those that are our Enemies, but likewise against those that supply them; but yet we must distinguish of the things that they use themselves. For some things there are that have use only in War, as Arms: some that have no use in War, but those that serve for pleasure: some that have use both in War and out of War, as Money, Corn, Victuals, Ships and things belonging thereto.

1. It is plain, that by the first he is my Enemy that supplies my Enemies with things necessary for the War.

2. But by the second he is not, according to that of *Cicero*: *I will not help him to Monies to pay his Guards; he shall desire Marbles and Robes, such things hurt not only they minister to his Luxury: Soldiers and Arms I will not supply him with; if he shall seek for Players and Recreation to soften his fierceness, I will gladly offer to him: Ships of War I will not send him, but such as are for Pleasure and Ostentation of Princes sporting in the Sea. I will deny to give him one that purposes the destruction of another's Country: those things that are essential, for it is a bounty necessary to be allowed of.*

3. But in the third, which is a doubtful use, there is a state of the War is to be considered: For if I cannot defend my self unless I intercept the things sent,

*French and
Dutch in en-
mity, and the
English neuter
with both, the
latter permit-
ted the
French King
to build a Ves-
sel of Pleasure
at Portsmouth,
which was
sent into
France, and
was no breach
of the Neu-
trality, Anno
1676.*

necessity will then give right, but with the Burden of
 Restitution *, except some other cause accede; but if * *Grotius in ju-*
 the apportation of those things hinders the execution of *re Belli & Pa-*
 my right, and he could know so much who brought *cis lib. 3. c. 1.*
 them, as if I had driven the Enemies Fleet into a Port *§. 5.*
 or Haven, or had straitned a Town with a Siege or *The English*
 Blockade, and were now in expectation of their yielding *drive the*
 or compounding, there is no question but he that shall *Dutch East-*
 in such case succour my Enemy, ought in Justice be made *India Fleet*
 liable for the Damage I have sustained through his *into Bergen,*
 means: like a Gaoler that shall wilfully suffer my Pri- *and the Dane*
 soner to escape; or one that hath rescued my Debtor *there protect-*
 unjustly detained by me for my damage, whereby I am in- *ed them a-*
 jured and according to the measure of my loss his *gainst the*
 Goods also may be seiz'd and brought into such a state, *League and*
 to the end I may obtain a just satisfaction. But if he *the Laws of*
 hath not yet done any damage, but hath been willing *Nations, for*
 to do it, there will be a right by retention or staying *which the en-*
 of the Ship and Goods to compel him to give caution *suing War was*
 for the future; but if my Enemies injustice towards me *accounted just*
 be most evident, and a Nation that ought to be Neuter *on the King of*
 confirm him in that most unjust War, in that case it *Britain's part.*
 will not only Civilly be liable, but Criminally as one *Sylv. in. verb.*
 that rescues a Pirate manifestly guilty from the Judge at *Restitut. pag. 3.*
 the very Bar, and therefore it will be lawful to deter- *§. 12.*
 mine against him by such measures as are necessary and
 meet for his Offence, wherefore within those rules, he
 may be spoiled of Ship and Lading; and that is the true
 reason wherefore Indiction or publick Proclamation by
 internal right ought to be denounced, that so other Na-
 tions may see they have a just cause who commenc'd the
 War, and that they ought not to be impeded in the ac-
 quiring due satisfaction.

And though Neuters are not compellable, by the ri-
 or of War, to afford assistance to either Party without
 the Will of the other, yet such may the emergency of the
 case be, that if enforc'd, they may lawfully declare,
 though to the damage of the weaker. Such was the
 case, when the *Venetians* had so far prevail'd against the
Turks in *Candia*, that *Canea* which they then besieged by
 sea and Land; was brought to that extremity that in all

human probability it must then have been speedily surrendered, the *English* Ships being then at *Smyrna*, and prest by the *Turk* to assist the *Grand Signior* in the relief of that City. If the Persons whom the *English* had thus assisted, had been Christians, there is no question this Auxiliary aid had been well; but to assist an Enemy of Christianity against Christians themselves hath seemed doubtful: but surely there seems little reason for such an Ambiguity; for if it be lawful to make League with those that are Aliens from the true Religion by the Law of Nature, then there can be no doubt but they may be aided. Now by the Law of Nature they may be entred into by Christians with such, for that Law is so common to all Men, that it admitteth not any Difference of Religion: nor was the same universally forbidden by the *Hebrew* Law, as appears by *Abraham's* aiding the wicked *Sodomites* with his Arms; and that which was very remarkable, that the *Asmoneans* being exceeding skilful in the Law, and great Observers of the *Hebrew* Rites, yet made they Leagues with the *Lacedæmonians* and *Romans* by the consent of the Priests and People, yea and publickly offered Sacrifice for their safety: nor were they forbidden by the Evangelical Law, according to that of *Tertullian* who observes, That so long as *Israel* was only his people, God did justly command mercy towards their Brethren alone; but after that, he gave unto *Christ* the Nations for his inheritance, and the ends of the Earth for his possession, and that began to be paid which was promised in *Hosea*, *They that were not my People shall be my People, and the Nations that had not obtained mercy shall obtain mercy*; From that time *Christ* hath extended unto all the Law of fraternal benignity, excluding none from our Compassion, no more than from his Vocation: from whence it follows, that the action of those Caprains being then in the power of the *Turk*, was lawful in the assisting them against the *Venetians*.

Laws corum in Thargum.

Vid. Carolum Molin. tract. 2. disput. 112.

Lib. 7. Ch. 3.

Vide the Case at large in the end of this Chapter.

Jus feciale.

XXV. And although the Goods of Friends, according to the circumstance of the case, may be preserved by adjudication, and restored to their owner; yet all manner of Goods have not that privilege: For though the *Freedom of Trade* preserves the Goods of Friends, against

the rigor of War, yet it does not those Goods that supply the Enemy for War, as Money, Victuals, Ships, Arms, and other things belonging thereto; for to supply an Enemy that intrudes our right, or seeks the destruction of our Countries, is a liberality not to be allowed of, and it certainly stands with necessity, that if I cannot safely defend my self or endamage my Enemy without intercepting the things sent, it may justly be done: but when such goods are seized, whether they give the Captor a right of Property, or right by retention, to compel that neuter Nation to give Caution for the future, by Hostages or Pledges, not to supply the Enemy, may be a question. The Romans who had brought Victuals to the Enemies of Carthage, were taken by the Carthaginians, and again rendred up on request; the Hollanders in the heat of the War between Sweden and Poland, never suffered themselves to be interdicted with either Nation; the same State when they had War with Spain, intercepted the French Ships, passing to or from Spain but restored them.

*Vide Treaty
1 Dec. at Lon-
don 1674. Art.
the third,
what is meant
by Goods
Contraband
or prohibi-
ted Merchan-
dize.*

*Cambden vide
Ann. 1589.
1595.*

Plutarch.

*Meursius in his
Danish Hist.
1. part. 2.*

And Pompey, in the History of the Mithridatick War, set a Guard on the Bosphorus, to observe if any Merchant sail'd in thither; whosoever did, and was taken, was surely put to Death; so Demetrius when he possess'd Attica with his Army, having blockt up Athens, hang'd up both the Master and Commander of a Ship, who attempted to bring in Corn: the Hollanders having blockt up Dunkirk, some English Merchants Ships did attempt to enter, but were denied by the Hollanders.

Most certain, if a Neuter Nation hath had notice of the War, and Caution given them (as is usual) not to supply the Enemy with the Counterband Goods, as they call them; if such be the case, the prize is become absolutely the Captor's. So Queen Elizabeth did, when she seiz'd on the 60 Sail of the Hansiatick Towns, who were carrying of Goods, *ropas contrabanda*, to the Spaniard her Enemy; she condemned them, and made them absolute prize; For as neutrals are not compellable by the rigour of War, to give any thing against their Will, so must they not against the Will of each Party afford such things may damage one another. For Persons or Nations having had notice of the War, which is done, and Caution given sometimes by Proclamation, or some other publick

*Vide Tit. Cu-
stoms.*

*31 Eliz. C. B.
Owen 45.*

Bald. adl. 2. c.
de Seven 70.

Under the
Name of Con-
traband may
be compre-
hended Arms
only, as pie-
ces of Ordi-
nances, with
all Imple-
ments belong-
ing to them,

Fire-Balls, Powder, Matches, Bullets, Pikes, Swords, Lances, Spears, Halberts, Guns, Mortar-Pieces, Petards, Granadoes, Musket-rests, Bandaliers, Salt peter Muskets, Musket-shot, Helmets, Corslets, Breast-plates, Coats of Mail, and the like kinds of Armature; so for Horses and other Warlike Instruments. *Vide Marine Treaty between England and Holland, Decemb. 1. 1674. Art. 3. Vide the Attempt made by John Burrough to Trade with the Swede expressly against the Interdiction of the Danish King: Sir Walter Raleigh; l. 5. c. 1. § 10.*

So likewise it
is Ships Mafts,
and whatso-
ever shall be
thought or as-
certained ca-
pable of Ar-
ming an Enc-
my.

Bartol. l. nullus
iunc. lib. 2. de
Iudeis Calico-
lis.

L. Amilius Prætor accused the *Tejans* for victualling the Enemy's Navy, promising them Wine, adding, That unless they would do the like for the Navy of the *Romans*, he would account them as Enemies: but common experience hath taught Nations and Kingdoms, when they declare Neutrality, to make Provision by way of League with both the Nations at War, that when it should happen the Armies of both, or any draw towards their Territories, it might be lawful for them to exhibit the Common Offices of humanity to both.

It happened that about seven stout Merchant Men rode in the Port at *Smyrna*; the General of the *Venetians* being jealous of their joining with the *Turkish* Armado, desired to know their Minds, who answered, they would prove Neuter in the dispute; but afterwards (though at first the Captains all refused) upon the threatning of the *Grand Signior*, to lay an Embargo on all the Goods of the *English* Nation in his Dominion, and to make slaves of their Persons; those Captains were forced to join with the *Turkish* Forces, who beat the *Venetians* from before *Canea*, and so reliev'd it; the

Anno 1650. or
1651. vide R.
Cooke of the
church's state
in equal dan-

Ven-

Christian's Ambassador complained to the then Powers in ger with the
land, but could have no Relief, being answered, *That Trade.*
Ships being in the Turks Power, were subject to it, the
ident being such as made the Action lawful, as we
e afore remembred.

Leagues may be made with Infidels, by the Law of
ture, and likewise by that of Religion, which is so
ally indulgent to all Men, that it will not admit of
difference upon the Score of Religion. *Vid. Ex-*
ples and Cautions. *Grot. de jure belli & pacis lib. 2, Cap.*
§. 8, 9, 10, 11, 12.

B 4

CHAP.

C H A P. II.

Of Letters of Marque and Reprizal.

- I. Of Reprizals generally considered, and for what Causes awarded.
- II. Whether unlawful by the Law of Nature and of the Roman Law.
- III. Where lawful by the Laws of Nations at this day, and the reasons wherefore they are so received.
- IV. Of the Advantages that accrue universally by such Reprizals.
- V. Of the essential causes or grounds generally for the awarding Letters of Reprizals.
- VI. Of the essential causes or grounds particularly that are requisite before they can be awarded by the Laws of Nations and of this Realm.
- VII. Of the ordinary and extraordinary by the Laws of England.
- VIII. Whether the same creates a debt in the Grantee, and whether the Execution may be suspended.
- IX. Whether the awarding the same amounts to a Breach of Peace.
- X. Of Letters of Reprizal extraordinary where granted, and of what force.
- XI. That it consists with the Interest of Princes, not only to prevent those things that may occasion Reprize, but likewise not to deny the same, if there be ground sufficient.
- XII. The difference of Injustice offered to Subjects and to Foreigners, and where the one is concluded by the same and not the other.
- XIII. What is meant by denying of Right and doing of Injustice, and where Reprizal takes rooting, and where not.
- XIV. Of Reprizals where awarded. for denying of common Justice or those which are called Letters of Marque in cases ordinary.
- XV. Not repairing the damage after Letters of Request creates a National debt, and is the Foundation of Reprizal.
- XVI. Domicil not Origination subjects to reprize.
- XVII. Reprizal not grantable, if the spoil was occasioned by War.
- XVIII. Of Persons exempted from Reprizal by the Laws of Nations Canon and Civil Law.
- XIX. Where Ships and Goods are subject to Reprize, and where not.
- XX. When Right is denied, whether life is engaged, and whether persons refusing to yield may be slain.
- XXI. Goods taken by Reprize where the property is altered, and where not tryable in the Admiralty.
- XXII. Where many Ships are present, and one becomes Captain whether the spoil must be divided or remain his that became Master of the Prize.
- XXIII. Where the Grantee of Letters of Reprizal may become Pirate notwithstanding such Commission.
- XXIV. Where a miscarriage does not an Injury in the Grantee, nor subjects him nor to a further damage to the sufferers.
- XXV. Of the Duties incumbent on the Captor, and whether the Goods taken are subject to pay Customs.
- XXVI. After the debt and damage satisfied, restitution of the rest ought to be made.
- XXVII. Contribution, whether can be by the Laws of England to him whose Goods are taken by Reprize.
- XXVIII. Where Commissions have been awarded for the inquiring Depredations, under which Parties have sometimes obtained satisfaction.

Repriſals known to us by the word *Repriſalia*, or *Letters of Marque*, in Law have other appellations, *Grot. de Jure Belli et Pacis lib. 3. c. 2. §. 5.* *Pignoratio*, *Clarigatio* and *Androlepsia*, &c. in imitation of that *Androlepsia*, among the Greeks, to ſeize the three Citizens of that Place, whither the Murderer had fled, and was always given to him who required revenge of the Offender; the word (*Repriſals*) is from the French *prendre* and *Repriſe*, i. e. *reſumptio*, that is, to re-take or to take again one thing for another, like our Saxon *Wite-nam*. Though the Act is now become lawful by the *Consent* (indeed *consent*) of *Nations*, yet muſt it have its ſtandard-mark, for the ſame cannot be done by any private authority, but only by the power of that Prince or State, to whom the Subject the injured perſon is; nor is it ſame grantable by Authority, but where the party injured has *juſtice denied him*, or the ſame *illegally denied*.

Repriſals are all one, both in the Common and Civil Law; *Repriſalia eſt poſteſtas pignora-randi contra quemlibet, de terra debitoris data creditori*

injuris & damnis acceptis, vocabular. utriusque Juris. 27 E. 3. Stat. 2. cap. 17. E. 204, 205.

I. By the *Law of Nature* no Man is bound for another's Act, but only the Succeſſor of his Eſtate, for that Goods and Eſtate ſhould paſs with their *Burthens*, was introduced together with the *Dominion* of things; hence it is that the Son cannot be moleſted for the debt of his Father, * neither the Wife for the debt of the Husband, * neither the Husband for the debt of the Wife; the ſame being againſt natural equity, that one ſhould be troubled for the debt of another.

ſo it is, that no particular Men owe, or are obliged for the debt which the *Community* owes, that is, if the *Community* have any Goods; but if Money be lent to a *Community*, each particular is naturally bound, as they are a part of the whole, if the Stock publick be wanting. If one lends my Country Money (ſays *Seneca*) I will not pay my ſelf his Debtor, yet will I pay my ſhare. And again, if one of the People, I will not pay as for my ſelf, but contribute as for my Country. Naturally, nay, by the very *Law of Nature*, * one Village was not bound for the other, nor one Man's Poſſeſſions charged for another; no not ſo much

* *Leg. unica, c. ut null ex vicinis c. ne uxor pro mar. & ne fil. pro patre, &c. tit.*

Ulpian. Leg. ſicut ſcſ. quod cuique uni-verſorum Et ſinguli debebunt non tanquam proprii ſed tanquam publicam publici partem. Seneca lib. 6. de Benefic. c. 20. & cap. 19. Leg. nullum;

*c. de Execut. &
Exactionibus.*

much as with the debts publick : the reason being added, That it was against reason for one to be charged with the debt of another.

*In Nov. Just.
52. 134. C. u-
mico de injuriis
in sexto. Just.
Inst. de Jure
Nat.*

*Baldus 3. conf.
58. Bartol. de
repress. q. 5. ad
seruum 9.*

Liv. lib. 1.

III. And though by the *Law of Nature* one Man's Goods are not tyed for the debts of another, no nor for those of the *Publick*; yet by the voluntary *Law of Nations*, the same might be introduced and brought in, and the same may stand well with the *Laws of Nature*; for that might be introduced by Custom and tacit Consent, when even Sureties without any Cause, may subject and make liable their Goods and Estates for the Debts of a Stranger. So likewise that for any Debt, which any Civil Society, or the Head thereof ought to make good, or because the *Sovereign* or a *Head* hath not done right in another's Debt, but hath made himself liable to render satisfaction; such a *Society* may oblige and make liable all their Goods corporeal or incorporeal, for the reddition of Satisfaction. Hence it was, as the Great *Justinian* observes, That this Custom was constituted by the *Nations*, grounded on the urgency of humane needs, asserted with the greatest of Necessities: since without this, great licence would be given and tolerated for the committing of depredations and injuries; especially if only the Goods of Rulers were made liable, who seldom possess any thing, that for satisfaction, the injured may easily come by, whereas those private Men, whose Commerces are various, may be caught for recompence, sometimes with the greatest of ease, and freest from danger. Besides, the Owners of such Prize being Members of the same *Society*, might more easily obtain mutual right for satisfaction of the injur'd, and their own future indemnity than *Foreigners* could, who without such a Tye would be very little regarded.

IV. Besides, the Benefit of this Obligation was common to all Nations, so that they which were one time grieved with it, another time might be eased by the same. Moreover that this Custom was received, appears not only out of full Wars which Nations wage against Nations (for in these what is observed may be seen in the Forms of the ancient Denunciations. *Populis priscorum Latinorum, hominibusque, priscis Latinis bellum indicia*

o facioque. So likewise in the Proposal: *Vellent, jubere Philippo Regi Macedonibusque, qui sub regno ejus essent, in indicium.* And in the very Decree or Proclamation *Populus Romanus cum populo Hermundulo hominibusque Hermundulis bellum jussit* but also where Wars are

come to that fulness of War, yet there is need of a violent Execution of Right, that is imperfect. *Agésilas* of old said to *Pharnabazus*, a Subject to *Plutarch Agis* King of Persia: *We, O Pharnabazus, when we were his*

King's Friends, carried our selves like Friends towards all and being now become his Enemies, we carry our selves Enemies; wherefore seeing you will be one of the things are his, we do justly oppose him in you. A species of sort of Execution by Reprizal was that which the *Athenians* called apprehension of Men, of which the *Athenians* Law (as *Mr. Rous* observes) *If one have force offer'd*

and die, his Kinsmen and Friends may apprehend Men, whether the Manslayer be duly punished or yielded; but it is not lawful to apprehend three Men and no more. By which it only appears, that for the debt of the City which is due to punish her Subjects that have hurt others, is a certain incorporeal right of the Subjects, that is, liberty of taking whom they please, and doing what they will: So that such Persons so taken, by that might be made Slaves until the City did do that which by Law she was obliged to perform. In like manner to recover a Citizen taken Captive by man's Injury, are the Citizens of that City, where the Injury was done, retained by Reprize. Wherefore at *Carthage* they would not suffer *Ariston* the *Tyrian* to be taken; for, said they, *the same will befall the Carthaginians of Tyre, and in other Towns of Trade, whereto they often*

A due Administration of Justice is not the least part, wherein Princes are stiled Gods: To deny or delay Justice is Injustice; Justice is every Man's right and hath not forfeited what he might claim by the Jus

therefore the Party cannot obtain his Definitive Sentence or Judgment, within a fit time against the Person of whom he complains, or if there be a Judgment against apparent Right and Law; yet if no Relief can

Lib. 31.

Gellius lib. 16.

cap. 4.

Plutarch Agis.

Archæologia

Attica.

Herod to

whom it was not lawful to make War against the Arabians, might lawfully use pignoration.

Joseph. lib. 6.

Liv. lib. 34.

C. Si sententia

c. 16. de Sent.

excom. in 6

constit. Leg.

qui restituere

de rei vindic.

can be had, the Bodies and Moveables of his Subjects who renders not right, may be taken.

VI. In the Prosecution of which there must be,

1. The Oath of the Party injured, or other sufficient Proof, touching the pretended Injury, and of the certain Loss and Damage thereby sustained.
2. A Proof of the due Prosecution for the obtaining of Satisfaction in a legal way.
3. Protestation or denial of Justice.
4. A Complaint to his own Prince or State.
5. Requisition of Justice by him or them, made to the Supream Head or State, where Justice in the ordinary course was denied.
6. Persistency still, in the denial of Justice.

All which being done, Letters of Reprizal under such cautions, restrictions, and limitations as are consonant to Law, and as the special case may require, may issue not only by the *Jus Gentium* and *Civile*, but by the ancient and municipal Laws of the Kingdom *.

* *Magna Charta* c. 30. the latter Clause.

Clauſ 7. *Johan. Reg. m.* 22. *Pat.* 15. *E.* 3. *part.* 2. *dors.* 48. *Pat.* 23 *H.* 6. *part.* 2. *dors.* 14, 15.

VII. The *Reprizals* grantable by the Laws of *England*, are of two sorts, *Ordinary* and *Extraordinary*. The *Ordinary* are either within the Realm or without, and are always granted where any *English* Merchants or their Goods are spoiled, or taken from them, in parts beyond the Sea by Merchants Strangers, and cannot upon Suit, or the King's demanding of Justice for him, obtain the same, he shall have upon Testimony of such prosecution, a Writ out of the *Chancery*, to arrest the Merchants Strangers of that Nation their Goods here in *England*; the which is grantable to the Subject oppressed of *Common Right*, by the *Chancellor* or *Keeper* of *England*, who always in such case hath the approbation of the King or Council, or both, for his so doing; the other, which is for satisfaction out of the Realm, is always under the Great Seal.

VIII. But Letters of Reprizal granted in the *Ordinary* way for reparation out of the Realm, which are always under the Great Seal of *England*, cannot be revoked (though

Fitz. H. N.
Br. 114. a. b.
Reg. 129.
Pat. Rolls 14.
14 *H.* 6. *par.*
1. *dors.* 15. 17.
22. & *M.* 5. 6.
7. *patr.* 2. *dors.*
18. 22 *E.* 4 *par.*
2. *M.* 25. *dors.*
2. & 4. *Inf.*
124. 125. 137.
Lex. Mercat.
129.

chap. 2. Of Letters of Marque and Reprizal.

though perhaps in point of State there may be a suspending the Execution of them for reason grounded on the publick good) and the reason wherefore they cannot be annulled or revoked is, because after the Person injured hath petitioned, and hath according to Law made out by proof his loss, and Letters of Request have gone, and no reparation made, then the Letters Patents of Reprizal being sealed, the same does immediately create and vest a National Debt in the Grantee to be satisfied in such manner and by such means as the same Letters Patents do direct out of the Goods and Estates of his Subjects, who refuses or protelates to do right (however as the King hath the Legislative Power of Peace and War in a publick Treaty for the Nation's good, they may be mortified, and then revoked by the great Seal in pursuance of that Treaty.)

Leg. qui restituere de rei vindic.

Vide Treaty 1666. Bredd Art. 5.

Nor do I see it an act unjust internal to deny the Execution of such Letters Patents, according to that of St. Paul, *All things are lawful for me, but all things are not expedient.* Now to the true Interpretation of the word lawful strictly, it is to do a thing without violating the Rules of Piety and Charity. Now there are many things amongst men which are not internally just, and cannot be done without violating the Laws of Charity, yet are lawful to be done, as in the Law of the XII. Tables, the Creditors might divide the Debtors Body amongst them. So in acquiring satisfaction for Damages, the Lives and Goods of Innocents may be involved in Death and Destruction, whose peaceable Traffick in Commerce never gave them knowledge of this *privatum Bellum*, nor were they Actors in the Injury original. 'Tis true externally, according to that of Lucan, *That Prince or State that denies me right, gives me all.* But the incomparable Cicero observes, *That there are some Offices to be done to them from whom you have receiv'd an Injury, for revenge and punishment must have a measure.* Now if the supream Power does think that the Execution of such Letters of Reprizal cannot well be effected without endangering the Peace of both Estates; there may be a just cause to resist the Execution till a time more convenient may occur, for that the Lives and Estates of thousands may be involved in the repairing of one Injury, private and pecu-

Quintilian.

Omnis dat qui iusta negat.

Cicero ipse oportet, etiam sicut. Idem pro Milone.

Est enim ali- quid quod non oportet, etiam sicut. Idem pro Milone.

pecu-

peculiar : Nor do I see the same to appear repugnant to the Laws positive that have been made for the awarding those Commissions. 'Tis very true the Statute

† 4 Hen. 5. c. 7. reciting, ' That at the grievous Complaints of the Commons of *England*, who had suffered many Wrongs and Injuries in the Loss of their Ships and Goods upon the main Sea against Leagues, safe-Conducts, and Treaties which were broken by the Subjects of other Nations, the same Parliament reciting their willingness to provide Remedy and Relief for the grievous spoil and injuries done unto them beyond the Seas, upon Complaint to the Keeper of the Privy Seal (on full evidence shewn) he shall sign Letters of Request to demand restitution and reparation to the Parties griev'd : Which if not made in convenient time, then the Lord Chancellor of *England* shall grant Letters of Reprizal in due Form of Law for the Indemnity of the Persons interestted and injured. Yet this does in no respect restrain the King's Prerogative and Authority, which he had at the Common Law in the judging the conveniency and time, when to be executed. Nor does the Subsequent Statute †, reciting : ' Whereas

† 14 Ed. 4. c. 4. ' vers great offences were often committed against Leagues, Truces, and Amities between the King and other Princes or States, against safe-Conducts and Treaties, and against the Laws and Statutes of the Realm (in that case made and provided) to the great slander of our Sovereign Lord the King, and the Damages of the good Subjects the Commons of *England*. It was therefore Ordained, Established, Enacted, and Confirmed by the Consent of the Lords Spiritual and Temporal, and Commons assembled in Parliament, That all Statutes and Ordinances against the Offenders of Leagues, Truces, safe-Conducts, and Amities shall be in full force excepting the Clause in the Act which made it High Treason in the Second Year of Hen. 5. Therefore it is plain there were Statutes made for the more effectual providing for the Subject, and Letters of Reprizals, they being granted long † before the Statutes; and the King's Prerogative not the least diminished; but remaining at the Common Law to judge when expedient.

† Johan. Reg. memb. 22.

Pat. 15. Ed. 3. part. 2. dorf. 48.

IX. And since the granting of Letters of Reprizal does not, in the ordinary way for particular satisfaction amount to a breach of the Peace, I have thought fit for the excellency and care that is had in the composing and framing of them, to recommend one that was granted upon Solemn Advice, and for the Reasons therein mentioned. *Vide S. 15. postea.*

X. The *Extraordinary* are by Letters of *Marque*, for reparation at Sea, or any place out of the Realm, grantable by the *Secretaries* of State, with the like approbation, of the King or Council, or both; but they are only during the King's Pleasure, and to weaken the Enemy during the time of War, and may at any time be revoked.

XI. As Princes by the Laws of *Nations* are responsible for injuries *publick*, so should they by the most prudent ways imaginable prevent those that are *private*, not suffering Foreigners, if possible, to receive wrongs in their Countries: For, as the *Florentine* observes, *If a Man be exceedingly offended, either by the publick, or by any other private band, in a Foreign Nation, and cannot obtain reparation according to Justice, he will never leave blowing the Coals, or cease promoting the injury, till the flame break out into War; in which he cares not if he see the ruin of that Kingdom or State, where he receiv'd his wrongs.* *Machiavel on his Tit. Liv. C. A Prince in this latter Age lost his Country but for a Load of Sheep Skins. Philip Comines in vita Caroli Ducis Burgund.*

Nor should the Prince or State of the Person injured, value his Misfortune at so low a Rate, as to deny him Letters of Request, for that were to heap up injury upon injury; but likewise, if Justice be denied after such request, to arm him with power to take satisfaction by reprisal, *vi, manu & militari.* *Leg. qui restituere de rei vindicat.*

Generally there always proceed Letters of Request, two or three, more or less; and according to the satisfaction sufficient or insufficient, returned in answer to the same, Commissions are awarded.

XII. *Subjects* cannot by force hinder the Execution, even of an unjust Judgment, or lawfully pursue their right by force, by reason of the efficacy of the power over them: But *Foreigners* have a right to compel, which yet they cannot use lawfully, so long as they may obtain satisfaction by Judgment. But if that ceases, then Reprizal is let in. *Res judic. pro veritate habetur; yet it is as true, Juxta male judicant pro injuria tenetur.*

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Et cum per injuriam Judicis dominorem quæ debitoris non fuisset, abstulisset creditor, quasi obligatum sibi; & queritur an soluto debitori restituatur eam oporteret; debitori Scævola restituentam proposuit, Leg. scripturam ff. de distr. pign.

XIII. Now Judgment is obtained either in the Ordinary Course; by way of *Prosecution*, or *Suit*, or *Appeal* from the same, after Sentence, or Judgment given, to a higher Court; or else in the *Extraordinary* way, which is by way of Supplication, or Petition to the *Supream Power*; but we must understand that to be, when the matter in controversy is, *tam quoad merita quam quoad modum procedendi*; not doubtful, for in doubtful matters the presumption is ever for the Judge or Court.

But the Reprizal must be grounded on wrong Judgment given in matters *not doubtful*, which might have been redressed one way or other; either by the ordinary or extraordinary power of the Country or Place; and the which was apparently *perverted* or *denied*.

But if the matter be doubtful, then otherwise; for in Causes dubious or difficult, there is a presumption always that Justice was truly Administred by them who were duly Elected to publick Judgments.

** Verus debitor, licet absolutus sit, natura tamen debitor permanet. Paulus Leg. Julia D. de cond. in-debitor.*

XIV. And yet in this latter Case, some **are* of Opinion, that if the Case were dubious, and if the Judgment were against apparent Right, the Stranger oppressed is let into his satisfaction; and the reason is, because the Judge's Authority is not the same over *Foreigners*, as over *Subjects*, for the reason above-mentioned.

If an *English Merchant* shall prosecute a Suit in the Ordinary Courts of the Law beyond Seas, and Sentence or Judgment shall pass against him, from which he appeals to the *Supream Judgment*, and there the first Judgment or Sentence is affirmed, though the Complainant hath received a Judgment against the *real Right* of the Cause, yet this will be no cause for Letters of Reprizal, though perhaps it may occasion Letters of *Request* (if there be strong circumstances for the same) to have a rehearing of the Cause.

But If an *English Man* shall recover a Debt there, and then the Officer having the Debtor in Custody, will willfully let the Prisoner escape, and then become insolvent, the same may perhaps occasion Reprizal.

Nulli vendemus nulli negabimus, aut deferemus justitiam, Grand Charter Cok. 2 Inst. 56.

In *England*, If a *Foreigner* bring an Action Personal against *I. S.* and the matter is found *special* or *general*, and the Party prays Judgment, and the Court refuses it; and then the Defendant dies, and with him the Action, (the

nature

nature of it being such) the Party is here without Remedy, the same may occasion Letters of Reprizal, if it be accompanied with those Circumstances that evince an apparent denial of Justice, *i. e.* as putting it off from Term to Term without cause.

An *English* Man pursues his Right in the legal Courts beyond Seas, and the Military Governour opposes the prosecution, and by force conveys away the Debtor and his Goods, the Sentence or Judgment is obtained: its ultimate end being *Execution*, being thus frustrated, may occasion Letters of Reprizal.

XV. Persons murdered, spoil'd, or otherwise dampnified in hostile manner, in the Territories or places belonging to that King, to whom Letters of Request are issued forth, if no satisfaction be returned, Letters of Reprizal may issue forth; and the Parties Petitioners are not in such cases compelled to resort to the Ordinary prosecution: But the Prince of that Country, against whom the same are awarded, must repair the damage out of his or their Estates, who committed the injuries; and if that proves deficient, it must then fall as a common Debt on his Country.

Such Letters of Request generally allot a time † certain for Damages to be repair'd, if not, Reprizals to issue forth: A singular Example of which you will find hereunder.

committed by the *Flemings* on the *English*, his Majesty in 1625. issued forth his Letters of Request to the States of *Holland*, for Satisfaction within 18 Months, otherwise Letters of Reprizal. *Vide Journals* of that Year, and *Leo Aitzma* p. 48 13. 41. 82. so likewise Letters of Request went to the King of *Spain*, requiring Satisfaction for the depredation committed on the Ship and Goods of Mr. *Stampe*, who was spoiled and murdered at the *Havana*, Anno 1674. *Vide* the Proclamation 1675. of Reward promised by his Majesty for the apprehending the Offenders dead or alive.

Case of slaughter, *Lee* against the Governour of *Leghorn* upon the Petition of *Goula* and *Canham* merchants in Nov. 1670. on which two Letters of Request were sent to the great Duke of *Tuscany*, for redress.

† After the Massacre at *Ambeyna*, and the other depredations

CHARLES the Second, by the Grace of God, of England, Scotland, France, and Ireland, King, Defender of the Faith, &c. To all Christian People, to whom these Presents shall come, GREETING: WHEREAS our loving Subject William Courten, Esq; of Great Britain, deceased, and his Partners Anno 1643. by the depredation and hostile act of one Gailand, Commander in chief of Two Ships belonging to the East-India Company of the Netherlands, was between Goa and Maccao in the Straights

Letters Patents, for special Reprizals from the King of Great Britain, (under the Great Seal of England) against the States General and their

Subjects, in-
rolled in the
High Court
of Chancery.
19 Maii. 15
Car. 2.

Straights of Malacca, deprived and most injuriously spoiled of a certain Ship named the Bona Esperanza, and of her Tackling, Apparel, and Furniture, and all the Goods and Lading in her, upon a very hopeful trading Voyage to China, which were carried to Batavia, and there all de facto without due Process of Law confiscated. And that also in the same Year another laden Ship of Our said Subject, called the Henry Bonadventure, being come on Ground near the Island Mauritius, was there both Ship and Goods seized upon by some of the Officers and Ministers, and others under the Command of the said East-India Company, and utterly detained from the right Owners. AND WHEREAS the said William Courten, and his Assigns in his Life time, used all possible endeavours to recover the said Ships and Goods, and to procure further Justice against the Malefactours, and yet could obtain no Restitution or Satisfaction, whereby they became to be much distressed and utterly undone in their Estate and Credit: And that thereupon, and upon the most humble Supplications and Addressses of Francis Earl of Shrewsbury, and William Courten, Esq; Grand-Child and Heir of the said Sir William deceased, Sir John Ayton and Sir Edmond Turner Knights, George Carew & Charles Whitaker Esquires, on the behalf of themselves and divers others interested in the said two Ships Bona Esperanza, and Henry Bonadventure, and in the Estates of the said Sir William Courten deceased, Sir Edward Littleton Baronet, & Sir Paul Pindar Knight deceased, that We would take their Case into Our Princely consideration. WE OUT OF A JUST SENSE We then had and still have of their unjust SUFFERINGS in that business; both by Our own Letters under OUR SIGN Manual to the States General of the United Provinces, and by Sir George Downing Knight and Baronet, Our Envoy Extraordinary, to whom We gave Especial Command so to do, required satisfaction to be made according to the Rules of Justice, and the Amity and good correspondence, which We then desired to conserve with them firm and inviolable. AND WHEREAS after several Addressses made to the said States-General by our said Envoy, and nothing granted effectual for Relief of Our said Subjects, (whom we take Our selves in Honour and Justice,

come

concerned to be satisfied and repaid) We lately commanded the said Sir George Downing to intimate and signifie to the said States, that we expected their final Answer, concerning satisfaction to be made for the said Ships and Goods by a time then prefixed and since elapsed, that We might so govern Our selves thereupon, that Our aforesaid Subjects might be relieved according to Right and Justice: And yet no satisfactory Answer hath been given, so that We cannot but apprehend it to be, not only a fruitless Endeavour, but a prostituting of Our Honour and Dignity, to make further Application, after so many denials and slightings. AND WHEREAS John Exton, Doctor of Laws, Judge of our High Admiralty Court of England, upon Our Command, to certifie to Us the Value of the Losses and Damages sustained by the said William Courten and Partners, whose Interest is now vested in our loving Subjects, Sir Edmond Turner, Kt. and George Carew, Esq, and Partners, hath upon full Examination and Proofs thereof made by Witnesses in Our High Court of Admiralty, reported and certified under his Hand, that the same do amount to the Sum of One Hundred fifty one Thousand six Hundred and twelve Pounds.

NOW KNOW YE, That for a full restitution to be made to them for their Ships, Goods and Merchandizes, of which the said William Courten, and the Assigns of the said William Courten and Partners, were so despoiled as aforesaid, with all such Costs and Charges, as they shall be at for the recovery of the same, We by the Advice of Our Privy Council have thought fit, and by these Presents do grant Licence and Authority under Our Great Seal of England, unto our said Subjects Sir Edmond Turner and George Carew, their Executors, Administrators and Assigns, for and on the behalf of themselves, and other Persons interested as aforesaid, to equip, victual, furnish, and to set to Sea from time to time, such and so many Ships and Pinaces as they shall think fit. PROVIDED, always that there be an Entry made and recorded in the Admiralty Court of the Names of all Ships and Vessels, and of their Burden and Ammunition, and for how long time they are victualled; And also of the Name of the Commander thereof, before the

same or any of them be set forth to Sea ; And with the
 said Ships and Pinaces by force of Arms to set upon,
 take and apprehend any of the Ships, Goods, Monies and
 Merchandizes of the States General, or any of the Sub-
 jects inhabiting within any their Dominions or Terri-
 tories, wheresoever the same shall be found, and not in
 any Port or Harbour in England, or Ireland, unless it be
 the Ships and Goods of the Parties that did the Wrong.
 And the said Ships and Goods, Monies and Merchandizes,
 being so taken and brought into some Port of Our Realms
 and Dominions, an Inventory thereof shall be taken by
 Authority of Our Court of Admiralty by the Judge
 or Judges thereof, for the time being, upon Proofs made
 before him or them, that the said Ships, Goods, Wares,
 Merchandizes or Money, did belong to the States Ge-
 neral, or any of the Subjects as aforesaid. That they
 shall be lawful Prize to the said Sir Edmond Turner and
 George Carew, their Executors, Administrators and
 Assigns as aforesaid, to retain and keep in their or any
 of their Possessions, and to make Sale, and dispose there-
 of in open Market or howsoever else, to their and every
 of their best Advantage and Benefit, in as ample manner
 as at any time heretofore hath been accustomed by way of
 Reprizal, and to have and enjoy the same as lawful
 Prize, and as their own proper Goods : SO THAT
 " NEITHER Captain, Master nor any of the Com-
 " pany, that shall serve in his own Person, or shall pro-
 " mote and advance the said enterprise in manner and
 " form aforesaid, shall in any manner of wise be reputed
 " or challenged for any Offender against any of Our
 " Laws. And that also it shall be lawful for all manner
 " of Persons as well our Subjects, as any other, to buy
 " the said Ships, Goods, and Merchandizes so taken and
 " apprehended by the said Captains, Masters and others,
 " and adjudged as aforesaid, without any damage, loss,
 " hinderance, trouble, or molestation, or incumbrance,
 " to befall the said Buyers, or any of them, in as ample
 " and lawful manner, as if the Ships, Goods, Wares,
 " and Merchandize, had been come and gotten by the
 " lawful Traffick of Merchants, or of just Prizes in the
 " time of open War. PROVIDED always, that all
 Ships, Goods, and Merchandize, taken by virtue of this
 Our

Our Commission shall be kept in safety, and no part of them wasted, spoiled, or diminished, or the Bulk thereof broken, until Judgment have first past as aforesaid, that they are the Ships and Merchandizes of the States General, or some of their Subjects as aforesaid. And if by colour of this our Commission, there shall be taken any Ships, Goods, or Merchandizes of any of our loving Subjects, or the Subjects of any Prince, or State in good League, or Amity with Us (except the States-General) or their Subjects as aforesaid, and the Goods therein laden, sold and imbezelled or diminished, or the Bulk thereof broken in any Place before they shall be adjudged to belong to the States General, or some of their Subjects as aforesaid that then this Commission shall be of no sufficient Authority to take the said Ships, Goods, and Merchandizes, or to warrant, or save harmless such as shall receive, buy or intermeddle therein; but that both the Prizes so taken, and the said Ship of War, shall be confiscated to our use. “AND FURTHER, We do hereby declare that it is our will and pleasure, that this Our Commission shall remain in full force and power, to all intents and purposes, untill the said Sir Edmond Turner, and George Carew, their Executors, Administrators, and Assigns, as aforesaid, shall by virtue thereof have by force of Arms apprehended, taken, seiz'd, recovered, and received from the said States General, or their Subjects, One hundred fifty one thousand six hundred and twelve Pounds, according to the Appraisement to be made by sufficient Appraisers upon Oath nominated and authorized in Our said Court of Admiralty, of all such Ships, Goods, Wares, and Merchandizes, as shall be taken from the said States General, or any of their Subjects, by virtue of this Commission, or shall otherways receive satisfaction of the Debt aforesaid, by Composition to be made between those of the East India Company of the Netherlands, and the said Sir Edmond Turner, and George Carew, their Executors, Administrators and Assigns, as aforesaid. NOTWITHSTANDING it so happen, the present Difference between Us, and the States-General depending upon general Reprizals, may be agreed and composed, and that in the interim a Peace

“ and good Correspondence may be renewed between Us
 “ and the said States-General: In which case nevertheless,
 “ It is Our Will and Pleasure that in the Execution of
 “ this Our Commission no violence shall be done to the
 “ Persons of the said Subjects of the said States-General,
 “ but only in case of resistance, and that after in cold
 “ Blood, the Subjects of the said States General, if hurt
 “ or wounded, shall be used with all convenient office of
 “ humanity and kindness. AND FURTHER Our Will
 “ and Pleasure is, That although it shall happen that all
 “ hostility between Us and the States General, and Our
 “ respective Subjects shall cease, yet this Our Commission
 “ shall remain, and be in full force and power, to the said
 “ Sir Edmond Turner, and George Carew, their Execu-
 “ tors, Administrators and Assigns, as aforesaid, by vir-
 “ tue thereof to apprehend, take and seize by force and
 “ Arms, so many more of the said Ships and Goods of
 “ the States-General, or any of their said Subjects, as
 “ besides the said Sum before mentioned shall counter-
 “ bail, satisfie, and pay all such Costs and Charges as
 “ the said Sir Edmond Turner, and George Carew, their
 “ Executors, Administrators, or Assigns as aforesaid,
 “ shall from time to time make Proof to have disbursed
 “ and paid towards the equipping, manning, paying, fur-
 “ nishing, and victualling of the said Ships, so licensed
 “ and Authorized as aforesaid, by this our said Commis-
 “ sion to be equipped, manned, furnished, and victualled by
 “ the said Sir Edmond Turner and George Carew, their
 “ Executors, Administrators, and Assigns as aforesaid, for
 “ the purpose aforesaid. AND OUR WILL and pleasure
 is, and we do hereby require Our Judge or Judges of
 Our High Court of Admiralty, for the time being, and
 all other Officers of the Admiralty, and all other our
 Judge or Judges, Officers, Ministers, and Subjects
 whatsoever to be aiding and assisting to the said Sir Ed-
 mond Turner, and George Carew, their Executors, Ad-
 ministrators, and Assigns as aforesaid, in all points in
 the due Execution of this Our Royal Commission, and to
 proceed to adjudications. and adjudge all Ships, Merchan-
 dizes, Monies and Goods by virtue thereof to be taken
 according to Our Princely intention, hereby signified and
 expresse, and to take care that this Our Royal Commis-

tion to be duly executed, and favourably interpreted and construed in all respects, to the Benefit and best Advantage of the said Sir Edmond Turner and George Carew, their Executors, Administrators, and Assigns, as aforesaid. IN WITNESS whereof, We have caused these Our Letters to be made Patents. Witness Our self at Westminster, the 19th Day of May, in the Seventeenth Year of Our Reign.

BY THE KING.

XVI. It is not the place of any Man's *Nativity*, but his *Domicil*; not of his *Origination* but of his *Habitation*, that subjects him to *Reprize*: The Law doth not consider so much where he was born, as where he lives; not so much where he came into the World, as where he improves the World.

If therefore Letters of Reprizal should be awarded against the Subjects of the *Duke of Florence*, and a Native of *Florence*, (but Denizen'd or Naturalized in *England*) should have a Ship in a Voyage for *Leghorn*, if a Caption should be made, the same is not lawful, nor can the same be made Prize.

XVII. Nor doth it any where appear, that *Reprizals* can be granted on Misfortunes happening to Persons or their Goods, residing or being in Foreign parts in time of War there; for if any Misfortune happens, or is occasioned to their Effects, or to their Persons, then they must be contented to sit down under the Loss; it being their own fault, they would not fly or relinquish the place, when they foresaw the Country was subject to the spoil of the Soldiers, and devastation of the Conqueror.

The Factions of the *Guelfs* and *Gibellins* in *Florence*, warring against each other. The *Guelfs* obtaining the Victory, and thrusting the *Gibellins* out of it, after they had taken the City, *Dom. cujusdam Hugonis de Papi in hoc Reg-* Mich. 5 E. 1.
no Angliæ demorantis diruerunt, and plundered his Goods Rot. 53. (in
herein, *qui Hugo supplicavit Domino Regi, ut Inde Itali* Thesaur. Re
Mercatores (of that Faction and City then in *England*) cept. Regis in
mendas hic sibi facerent; upon which *adjudicatum fuit*, Scac.) coram
quod dicti Mercatores dicto Hugoni satisfaciant pro damnis Rege Florentiæ.
usceptis, & destructione domus suæ: upon which a Writ of Vide Rot Vasco-
Error was brought, and the Judgment was reversed in niæ 28 E. 3.
these Rot. 7. pro Rob.

Draper & alii these words ; *Quod non est consuetudo Angliæ de aliqua trans-*
Civibus Corke gressione facta in aliena Regione, tempore Guerræ, vel alia
in Hibernia. modo—consideratum est, quod totus processus & ejus effectus
provocentur, &c.

Rex facisne tu
Regium Nun-
tium Populi
Romani Quirit.
vasa comitesq;
meos. The Am-
bassador of the
Romans being
ill used by the
Carthaginians,
and Scipio's
Army having
surprized the
Ambassadors
of the Cartha-
ginians, was
demanded
what should
be done to
them, answer-
ed, not as the
Carthaginians
have done to
the Romans.

XVIII. By right (for so it is now called of rendring like for like) there are many persons exempted, and those whose Persons are so privileged, have also protection for their Goods, some by the *Laws of Nations*, some by the *Civil Law*, others by the *Common Law*; among which *Ambassadors* by the *Laws of Nations*, their *Retinue* and *Goods* are exempt, coming from him who awarded the *Reprize*, the *Laws of Nations* not only provided for the *Dignity* of him that sends, but likewise the *secure going and coming* of him that is sent.

Nor against those that travel for *Religion*, nor on *Students*, *Scholars*, or their *Books*; nor on *Women* or *Children* by the *Civil Law*: nor those that travel through a *Country*, staying but a little while there; for they are only subject to the *Law of the place*.

By the *Canon Law* *Ecclesiastical Persons* are expressly exempt from *Reprizals*.

A *Merchant* of another place than that against which *Reprizals* are granted, albeit the *Factor* of such *Goods* were of that place, are not subject to *Reprizals*.

XIX. Ships driven into Port by storm or stress of weather, have an exemption from the *Law of Reprizals*, according to the *Jus Commune*, but by the *Law of England* otherwise, unless expressly provided for in the *Writ*, or *Commission*.

But if such Ship flies from his own Country to avoid *Confiscation*, or some other Fault, and is driven in by stress of Weather, she may then become subject to be prize.

But it is not lawful to make seizure in any Ports, but in his who awarded the *Reprizal*, or his against whom the same issued; for the Ports of other Princes or States the *Peace of them* are to be maintained.

Vita autem sub-
ditorum inno-
c. ntium, ut ex
tali causa obli-
gatur, fortè cre-
dium fu. t.

XX. Ships attacqued by those that have Letters of *Reprize*, and refused to be yielded up, may be assaulted and entred; and though it may fall out, not by intention, but by accident, that some of those that so resist, may happen to be slain, yet the Fault will lie at their own Doors.

chap. 2. Of Letters of Marque and Reprizal.

41

for hindring the Execution of right, and that which the Law most justly approves of.

*apud aliquos
populos, eo ni-
mirum quod*

*viderent unicuique hominum jus vite plenum esse in se, & ad rem publicam potuisse trans-
gredi, quod minime esset probabile, nec sanctiori Theologia consentaneum. Grotius de Ju-
belli lib. 3. c. 2. §. 4.* And seems to be of opinion by the Law of Charity, that
the Prosecution of right for a Man's Goods, which inevitably must be by the Life of
Man, ought to be omitted. *Lib. 2. cap. 10. Liv. lib. 2.*

XXI. This right of changing of *Dominion* is so odious,
that in the taking of Goods, if by any possibility the right
Owners may have Restitution, the same hath been done;
and though a larger time than 24 Hours may happen be-
tween the capture and recapture, and so may pernoctare
with the Captor; yet Restitution may be made.

If a Ship be Prize or not, this shall be tryed in the Ad- Prize or not
miralty, and no Prohibition shall be granted. The Case Prize is of
as, there being War between us and *Denmark*, a Priva- Admiral Ju-
tyer of *Scotland* took a Ship as Prize being a *Danish* Ship, risdiction.
and she was condemned as Prize by the Admiralty in
Scotland. And brought her upon the Land, and S. libell'd
in the Admiralty of *England*; and suggested that she was
not a *Danish* but a Ship of *London*. p. Curiam, In as much
that the matter is Prize or not Prize no Prohibition.
Jompson and Smith 1 Sid. 320. 2 Keeble 158. & 176.

One who had Letters of Marque in the late Wars A Ship taken
with the *Dutch*, took an *Ostender* for a *Dutch* Ship, and at Sea as Prize
brought her into an Haven, and libelled against her as shall be tryed
Prize, and the *Ostender* libelled in the Admiralty a- in the Admi-
gainst the Captor for damage sustained, for the hurt the ralty.
Ship sustained in the Port, and a Prohibition was prai-
sed for this that the Suit is for damage done in the Port,
for which an Action lyes at the Common Law, but the
Prohibition was denied, because the Original being a
Captation at Sea, and the bringing her into Port in or- Raymond 473
der to have her condemned as Prize, is but a consequent Hughes against
it, not only the Original, but also the consequences Cornelius &
all be tryed there. *Turner and Cary cont. Neele. 1. alios.*
ru. 243. 1. Sid. 367. 2. Keeble 360. 364. 1. Vent. 173.
Radly and Delbow con. Eglesfield and Whital 2. Keeble 828.
and 2. Lew. 25. 2. Saun. 259.

And therefore if he, who hath Letters of *Marque* or *Barthol. in Leg.*
reprizal, takes the Ships and Goods of that Nation, a- si quid Bello D.
gainst de cap. Ang. &

*Salic. in Leg. ab
hostibus, C. de
Capt. Const.
Gall. 20. tit. 13.
Art. 24. Consul
Moris 287.*

*Trin. 17 Car. I.
in B. R.*

March Rep.

110. 2 Keeble.

*441. Norris a-
gainst Berceley*

110. Res que

infra Præsidia

perductæ non-

dum sunt, quan-

quam ab hosti-

bus occupata,

Dominium non

mutantur, ex

Gentium jure.

Vide 6 A. c. 13.

§. 6, 7, 8.

*Mich 32. Eliz.
Somers and Sir
Rich. Bulkley's
C. Leonard 2.
part 182.*

gainst whom the same are awarded, and brings the same into a Neuter-Nation, the Owners may there seize her, or there the Admiral may make Restitution by Law, as well of the Ship's Goods to the Owners, as the Persons captives to their former Liberty; for that the same ought first to have been brought *infra Præsidia* of that Prince or State, by whose Subjects the same was taken.

And with this agrees the Common Law; for a Dunkirk having taken a French Vessel, sold the same at Weymouth, whither it had been driven before it was brought *infra Præsidia Dom. Regis Hisp.* it was in such case ruled, that if a Ship be taken by Piracy, or Letters of Marque and Reprizal, and is not brought *infra Præsidia* of that Prince or State, by whose Subject the same was taken, the same could not become lawful Prize, nor were the Owners by such a Caption divested of their Property.

But if the Caption be by Ships of War, the Property will be immediately in the Captors, and never divested, unless afterwards *vi, manu & forti* be in Battle regained.

XXII. Upon the sharing the Spoil of the captivated Ships, regard is had to the Ships present, not the Captors only; (for his Reward must be the Encouragement of his Prince, like the Roman Corona's, of which there were various, according to the Atchievement of the Conqueror, in imitation of which our Sovereign in his Royal encouraging Medals, follows the Example, to his deserving Commanders, as so many Ensigns to enflame Noble Souls to the performing Acts of Glory and Renown) for the profits of Prizes are to be equally divided amongst the Ships present, and not solely to the Captor; therefore if Letters of Reprizal are granted to two Ships, and they happen both of them at Sea to meet a Prize, and the one attacks and enters her, by means of which she becomes absolutely the Conqueror; yet the other hath right to an equal distribution with the Captor both in Ship and Goods, although he did nothing in the Conquest: the reason is, That although he mist the opportunity of taking

her, yet the presence of his Vessel Armed and prepared for Battle, at the time of taking, became a Terror to the Ship that was so conquered. And by the Law presumed *sine ejus*, that the other Ship would not or could not be so taken, which Law

hath

th passed the current, and approbation of the Common
w, as reasonable, just, and equitable, and may be
etended or surmised to entitle the Party Captor to the
aking Restitution of a Moiety to his Companion then
esent.

XXIII. But if it should happen, that those to whom
etters of *Marque* are granted, should instead of taking
e Ships and Goods of that Nation against whom the
me were awarded, wilfully take or spoil the Goods of *Trin. 2 Jac. in*
e other Nation in amity, this would amount to a down- *B. R. Rolls.*
ht Piracy. And the Persons offenders would for such *Abridg. fol.*
ult create a Forfeiture of their Vessel, and the Owners *530.*
ust be for ever concluded by the same, notwithstanding *Sir Francis*
ch *Commission*. *Moor's Rep. 1*
Jac. Waltham
vers. Mulgar.

XXIV. But that must be understood where such a Ca- *776.*
ion is done in a Pyratrical manner; for most certainly,
Letters of Reprizal are granted to a Man, and then he
volves the power to another, and the Party to whom
e power is consigned, takes the Ship and Goods of ano-
er Nation than against whom the same were awarded,
t upon a violent presumption that he made a right
aption, for that he found the Colours of several Nati-
s in the Ship, the Mariners of several Countries, the
ip of the Built of that Country against whom the Let-
rs of Reprizal were awarded, though perhaps upon a
udicial hearing the parties are restored to their Ship and
oods, yet the Captors are not to be punished *Criminali- Stat. 4H. 5. c. 7.*
nor the Grantee of the Letters Patents *Civiliter*: and *14 H. 4. c. 4*
e reason wherefore it was no injury in the Captors to
ke, did arise from the probable cause which will ex-
se the Captors from punishment; (though perhaps it
ll not from answering of the damage) but it is clear,
e Grantees are excused from both, unless privy to the
aption; and the reason is this, for the Letters Patents
not only vest the debt in the party, but do likewise
ve Power to the party to recover, and is a Judicial
ocess to obtain satisfaction *vi, manu & forti* from the
bjects of that Prince or State against whom the same
e awarded: So then it will be no more than if the
reditor deliver process to the Officer to take his
ebtor, and he takes a wrong Person without the know-
dge of the Creditor, this may subject the Officer

to answer Damage to the Party taken, but not the Creditor.

XXV. Therefore Letters of *Marque* or *Reprizal* issue not without good and sufficient Caution first given for the due observance thereof according to Law; the transgression of which creates a Forfeiture of the same.

And therefore having taken a Prize, and brought the same *intra Presidia*, the Captor must exhibit all the Ship-papers and captivated Mariners to be examined in order to adjudication, till when Bulk ought not to be broken without *Commission*, nor may the Captain of the Captor suffer an imbezlement of the lading; or sell, barter or dispose of any part without *Commission*; for the King hath a proportion in all Prizes.

3 Eliz. cap. 5.

12 Car. II. called the act of Navigation.

Such Goods so brought in are not subject to pay Customs.

XXVI. By the Law of *Nations*, *ipso facto*, the Dominion of the things taken by those to whom Letters of *Marque* are granted, become the Captors, till the Debt and costs, that is, the original damage and subsequent charges are satisfied, which being done, the residue ought to be restored: So the *Venetians* used their equity, having taken the Ships of *Genoa*, did not spoil any of the lading, but preserved the same very carefully, till the Debt was paid; which done, restitution was made of the things entirely, without diminution.

Greg. lib. 9.

Fitz. N. B.

fol. 162. Old N.

Bre. 103. Reg.

Orig fol. 176.

XXVII. When for the fault perhaps of a few, a debt becomes *National*, by reason of which the Goods of the Innocent become liable (if taken for satisfaction) whether by the Law of *England*, the party ought to have Contribution, is a question most certain by the *Common Law*; where more are bound to one thing, and yet one is put to the whole Burden, the Party may have process called *Contributione facienda* for his Relief: but when a debt becomes Universal or National, it seems otherwise: For if one lends my Country Money, I will not call myself debtor, yet I will pay my share*: so it may seem equitable by the Laws of Charity, though not compellable by the Laws of the Land.

* Seneca Benef. cap. 19.

XXVIII. Yet when depredations have happened to Foreign Merchants, and complaint hath been made, the King

ings of *England* have often issued forth Commissions to
quire of the same : and so it was done upon the Petition
some Merchants of *Genoa*, who complained against the
habitants of the Isle of *Garnsey* for a depredation, in *Pat. 26 E. 3.*
ing away and detaining their Merchandize and Goods, *pars 1. M. 16.*
the value of many thousands of Pounds, out of a Ship *Dorso.*
acked by tempest near that Isle, by which the Commis-
sioners were impower'd to punish the offenders, and to make
restitution and satisfaction for the damages.

The like complaint was made by the Merchants of the
Isle of *Britain*, of certain depredations committed by
Subjects of the King of *England*, who issued forth the *Pat. de An. 6.*
Commission, and to give them reparation and da- *H. 5. pars 1.*
mages for the same ; so that if the Subjects of the King *M. 9. Dorso.*
England have had their Goods taken by way of Re- *De Cateris*
prise for the satisfaction of such debt or damage, they *personis arrest.*
may have the benefit of the like Commissions to lick *& capiend.*
themselves whole out of the Estates of the Offenders.

CHAP.

C H A P. III.

Of Privateers or Capers.

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| <p>I. Of Privateers, whether allowable by the Laws of Nature.</p> <p>II. Of permission of such by the Laws of Nations.</p> <p>III. The occasion of their first Institution.</p> <p>IV. Whether it be lawful to undertake such an Employment.</p> <p>V. Of Commissions general to endamage an Enemy.</p> <p>VI. Of Commissions special and to Privateers, and the Immunities they claim by the same.</p> <p>VII. Of the care that is obliging on the issuing forth such Commissions.</p> <p>VIII. Of provisions made as in reference to their regulating, and especially in the last Treaty Marine between England and Holland.</p> | <p>IX. Of Goods subject to Prize, considered in reference to adjudication general.</p> <p>X. Of the Goods considered in reference to adjudication, on occasion special.</p> <p>XI. Of the Lading made Prize whether it draws in a Forfeiture of the Vessel, and where otherwise.</p> <p>XII. Whether Ships refusing to pick up to such, life is engaged.</p> <p>XIII. Privateers where subject to punishment, and their Actions where occasion a Forfeiture of the Vessel.</p> <p>XIV. Of things not subject to spoil.</p> <p>XV. Considerations general on Privateers.</p> |
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Leg. servus. D. I.
de Serv. export.
D D. ad Leg. si
quis in servitu-
tem. Defur. Leg.
prohib. c. de Fur.
Fisci.

Barthol. in Leg.
ut vim. D. de
Just. & Jure
n. 7. & 8.

Naturally every one may vindicate his own Right; therefore were our hands given us; but to protect another in what we can, is not only lawful, but commendable, since nothing is more serviceable to Man than Mutual Aid. Now there are divers obligations between Men which engage them to mutual Aid, for Kinsmen assemble and bring help, and Neighbours are called upon, and fellow Citizens for it behoves every one, either to take Arms for himself if he hath received injury, or for his Kindred, or for his Benefactors, or to help his Fellows, if they be wronged. And Solon taught, That Commonwealths would be best wherein every one would think another's injuries to be his own. But when War is denounced, it matters not what obligations are wanting, it is enough the Nation is injured in general; for in that every individual is wronged, and participate in the indignities and publick damages of the Country; to revenge or prevent which, is the duty of every member of the same.

II. Sin

II. Since therefore it is not against the *Law of Nature* to spoil him whom it is lawful to kill, no wonder that the Laws of Nations permitted the Goods and Ships of Enemies to be spoiled, when it suffered their persons to be slain. *Cicero Offic. 3.*

III. The approbation of which in the Wars of later Ages, hath given occasion to Princes to Issue forth Commissions to endamage the Enemy in their Commerce, and prevent such Supplies as might strengthen or lengthen War, to persons to whom the prize or caption becometh absolutely the Captors, and that to prevent the Sale of Ships of force to be absent from their respective Squadrons or Fleets.

By those of *Holland* they were termed *Capers*, by the *Spaniards* they had their denomination from their respective parts, as *Ostenders*, *Dunkirkers*, and the like, in England call'd *Privateers*; how far the Actions of those, as in relation to the attacking and killing of the Enemy, or Spoiling of their Ships and Goods are lawful, not being commanded nor hired thereto, may be a question.

In an Oath the second time, giving this reason, *Quia priore amisso jure cum hostibus pugnare non poterat*: *Cicero* sets down the very Words of *Cato* to his Son, where he admonisheth him not to enter into Battle; *Neque enim jus esse qui miles non sit* *pugnare cum hoste*. *Cic. Offic. 1.*

IV. By the Laws of Nations (as hath been said) it is lawful for every Subject of that Nation in War to seize upon the Enemies Goods and Ships, as also to kill them; and they are, after War denounc'd by Law, lookt upon as of no account, and if respect be had to natural and internal Right, it seems granted to every one in a just War to do those things, which he is confident within the just measure of warring, to be advantageous to the innocent Party: but though there may be such authority given, yet what title can they claim or appropriate to themselves of the Ships or Goods of Enemies, (for surely there is nothing owing to such, nor are they lawfully called to the same) unless they can shrowd themselves under the protection of this, that what they do, is only to exact punishment from the Enemy by the common right of men.

V. Commissions to kill or spoil the Enemy are in two respects, either General or Special: General as in a tumult;

The Son of *Cato* to *Censorinus* having served as a private Soldier of pay under *Pompilius*, the Legion being disbanded, the young man was resolved to remain with the Army, tho' but a Volunteer; *Cato* wrote to *Pompilius* the General that he should give

mult; among the Romans the Consul said, *Whosoever would have the Commonwealth safe, let him follow me*; and to all particular subjects is sometimes granted a Right of killing in self-defence, when it is publicly expedient, as on a sudden occasion, and the like.

*Leg. Deserto-
rem. D. de re
milit.*

*C. Quandoliceat
unicuique Leg.
1. & 2.*

VI. Special Commissions are such as are granted to those that take Pay, and are under Orders; the not obeying of which may be punished with Death, though the act succeeds well.

Others to repair a particular damage by way of *Ransom* prize, the original damage being turned into a National debt, but that satisfied, the other determines, or else to those who receive no pay, but go to War at their own charge; and that which is more, administer at their own costs a part of a War, by providing Ships of Force, and all other military provisions to endamage the Enemy or their Confederates, the which are termed *Privateers*, &c. as above, to whom instead of pay is granted leave to keep what they can take from the Enemy; and though such Licence is granted them, yet may they not convert of their own Heads to their private use those Prizes, before the same have been by Law adjudged lawful to the Captors, and the Admiral had his share.

VII. Nor may such Privateers attempt any thing against the Laws of Nations, as to assault or endamage an Enemy in the Port or Haven, under the protection of any Prince or Republick, be he Friend, Ally, or Neuter, for the peace of such places must be kept inviolably.

Sir *Kenelm Digby* having obtained a Commission against the French, who being in the *Streights*, was every where honoured as a *Cavalier* whom the King of Great Britain favoured; in his Voyage he took some Prizes, and coming to *Algier* redeemed several Captives, whom he took aboard, and placed in the several Vessels he had made prize of: the which he so effected, that in a short time he became *Illustriissimo* of six Ships of War; coming to *Cape Congare*, ten leagues from *Scandaroone*, and having sent a Boat to descry the road, word being brought that there were in the road two *Venetian* Galeasses, with two other Galeons, two *English* Ships, and several French Ships, Sir *Kenelm* being satisfied of the Prize, resolved to attack them the next morning, although the Admiral

of the *Venetians* had declared himself Protector of the French, and that he would destroy all the *English* Ships of War that he should meet, either in that *Republick's* or *Grand Signior's* Seas. Sir *Kenelm* notwithstanding resolved to engage them, and accordingly bore up to them, and the *Venetian* General weigh'd Anchor to meet him; Sir *Kenelm* before he fired, sent a *Satty* to Inform the *Vene-* This matter was highly debated at the Councilboard on the complaint of *andy* then Ambassador for that Republick at London, Anno 1629. Vide Hist. Republicke Venet fol. 170.

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 the breaking the Peace of the Port. Hist. Republicke Venet fol. 170.

VIII. In the granting of such private Commissions there always great care to be had and taken by caution, to reserve the Leagues of our Allies, Neuters and Friends, according to their various and several Treaties; and therefore at this day by the late Treaty between His Majesty and the States of *Holland* at London, before any Privateer Caper can receive Commission, the Commander is obliged to enter before a competent Judge, good and sufficient security by able and responsible Men, who have no part or Interest in such Ship, in 1500 *l. Sterling*, or 15500 *Treaty Maritime at Lond. Decem. 11. 1674.*
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 and that State, and upon pain of Revocation and annulity have given
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IX. If a Suit be commenced between the Captor of a Prize and the Claimer, and there is a Sentence or a Decree given for the party reclaiming; such Sentence or Decree (upon security given) shall be put in execution, notwithstanding the Appeal made by him that took the Prize, which shall not be observed in case the Sentence shall be given

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given

Art. 13.

These Articles given against the Claimers; if torture, cruelty, or barbarous use happens after a Caption to be done to the Persons taken in the Prize, the same shall *ipso facto* discharge such a Prize, although she was lawful, and the Captains shall lose their Commissions, and both they and the Offenders be subjected to punishment.

In hostium esse partibus, quia ad bellum necessaria hosti administrat.

Consulat. Maris editus est lingua Italica, in quem relatæ sunt constitutiones Imperatorum Græciæ. &c. cujus libri tit. 276.

X. Such sorts of Instruments having made a caption of Ships bound for an Enemy from Nations Neuter, or in amity with both the warring States: the lading, in order to be made Prize is reduced to these three several heads.

First, Those Goods that are fit to be used in War, under which are included Powder, Shot, Guns, Pikes, Swords, and all other instruments and provisions of Armature fit to be used in the Field or at Sea.

The second, are those things that may be used in time of War and out of War, as Money, Corn, Victuals, Ships, and the like.

And the last, are those Goods that are only fit for luxury and pleasure.

XI. The first are accounted Prize without controversy; *He is to be accounted an Enemy that supplies an Enemy with things necessary for the War.*

Cambden Ann. 1591. By the fourth Article of the Treaty at Lond. 1674. that may be used out of War as in War (except Ships)

The second is to be governed according to the state and condition of the war; for if a Prince cannot well defend himself, or endamage the Enemy, without intercepting of such things, necessity will then give a right to the condemnation. And so *Queen Elizabeth* did the *Hansiatick* Fleet taken, laden with Corn for *Lisbon*, upon consideration of the state of the War, the same became prize.

may not upon any account be called prohibited, nor subject to a condemnation, except carried to places besieged, *Art. 4. See John Meursius his Danish History concerning the Prohibiting of Goods by those Northern States. Vide postea, the Grand Prize condemned by Queen Elizabeth in tit. Customs, and vide tit. Ships of War, S. 24.*

The last become free, and (as we have before mentioned) according to that of *Seneca*; *I will not help him Money to pay his Guards; but if he shall desire Marbles and Robes, such things hurt not others, only they minister to his luxury: Soldiers and Arms I will not supply him with; if he shall seek for Players and recreations to soften his fierceness, I will gladly offer to him: Ships of War I would not send him, but such as are for pleasure and ostentation of Princes swimming in the Sea, I will not deny.*

XII. If

XII. If a Privateer take a Ship laden wholly with counterband Goods, both Ship and Goods may be subjected, and made prize.

And Persons so attempting to relieve an Enemy may in some cases be punished; but if the same be done by necessity of obedience, though the parties are much to be blamed, yet are they not to be punished; and so it was with those which relieved Sir *John Oldcastle* with provisions, who being taken, were discharged.

But if part be prohibited Goods, and the other part is not prohibited, but such as according to the necessity of the War shall be so deemed, the same may draw a consequential condemnation of Ships, as well as lading.

If part of the lading is prohibited, and the other part is merely luxurious and for pleasure, only the Goods prohibited become prize, and the Ships and the remainder become free, and not subject to infection.

By the seventh Article in the Treaty at London, if the Skipper will deliver out the prohibited Goods, the

Ship may proceed with the rest in their Voyage or Course, as they please, and the Ship shall not be brought into Port.

XIII. If such Ships shall be attacked in order to an examination, and shall refuse, they may be assaulted, like a house suppos'd to have Thieves or Pirates in it, refuses to yield up their persons, may be broken up by the Officer, and the persons resisters may be slain.

Nec reus est mortis alienæ, inquit Augustinus, qui sui possessioni murorum ambitum

circumduxit: si aliquis ex ipsorum usu percussus intereat. Publ. Epist. 154.

XIV. But if any of these Privateers wilfully commit any spoil, depredations, or any other injuries, either on the Ships of our *Friends* or *Neuters*, or on the Ships or Goods of our own Subjects, they will notwithstanding they are not in pay, be subjected in some cases to Death and other punishments, according to the demerits of their crimes, and perhaps may subject their Vessel to Forfeiture.

Leg. 5. de Navicul. C. lib. 3. Trin. 3 Fac. in B.R. Rolls 5. p. Abridg. f. 530.

And though by the Law of Nature the Goods of Enemies are to be spoiled as well as their Persons slain, yet some Goods and things seem exempted, and ought not to be spoiled, and therefore it is not lawful to land on the Territories of our Enemies, to spoil places dedicated to God: though *Pomponius* observes, when places are taken by the Enemy, all things cease to be Sacred; the Religions.

Pompon. Leg. cum loca D. de the Religiosis.

Tacit. Annal.
13.

Wars and Victories for the most part consist in taking and overthrowing Cities, which work is not done without injury of the Gods, the walls of Cities and Temples of the Gods partake in the same

ruine, the Citizens and Priests equally slaughtered; nor is the rapine of sacred riches and prophane unlike: so many are the Sacrileges of the Romans as their Trophies, so many are their Triumphs over Gods and Nations; and then goes further, *Tu manubiae quot manent adhuc simulachra captivorum deorum. Mox & bene, Quod si quid adversi Urbibus accidit, eadem clades Templorum quae & manium fuerant.*

Even upon the same Reason, that the Instruments of Husbandmen are not to be taken for a pledge by the Civil or Common Law. *Leg. exeunt. C. quae res pign.* Coke. sup. Littleton 47.

the reason given is because the things which are call'd Sacred, yet are they not indeed exempted from humane uses, but are publick. *The Townsmen, saith Tacitus, opening their gates, submitted themselves and all they had to the Romans, themselves were spared, the Town was fired. Pompey entred the Temple by the right of Victory, not as a suppliant, but as a Conqueror: and though that privilege may seem right by the Law of War to a Sovereign, or a General, that intends a Conquest, yet that power may not seem devolved to him, whose Commission is cautionally to endamage the Enemy only, as in reference to his commerce and provisions of enabling them to withstand the War: Certainly, that Conquest is poor, whose Trophies and Triumphs are made up with Roofs, Pillars, Posts, Pulpits, and Pews, and the spoil of Agriculture. Hence it is, that at this day the King of France in Germany and the Netherlands accepts of Contributions, by which the Cities and Churches are not only spared, but even the Countrymen plough and sow as quietly as if there were no Armies in their Territories at all.*

XV. Most certain, those sorts of Capers or Privateers, being Instruments found out but of later Ages, and it's well known by whom, it were well they were restrain'd by consent of all Princes; since all good Men account them but one Remove from Pirates, who without any respect to the cause, or having any injury done them, or so much as hired for the Service, spoil Men and Goods, making even a Trade and Calling of it, amidst the Calamities of a War, and driving a commerce and mart with the spoil, and that with as much peace and content, as if they had never heard of Tears, Blood, Wounds or Death, or any such things: such to expose their lives against Ships of the like kind, were both honourable and just, or those that should aid the Enemy with Goods prohibited

hibited as afore, such Prizes were possessions most noble; but the Goods, Ships and Lives of the innocent peaceable Traders to be exposed to rapine and spoil, renders them worse than the *Roman* Lictors, by how much 'tis to kill without cause, Headsmen executing the guilty, they the guiltless.

It was a high necessity that enforced the *English* to commiffionate such, the number of her then Enemies covering the Sea, like the *Egyptians* Locusts; it were well they were rejected by consent, or if allowed of, not subject to Quarter, when taken by Ships of War: A Trade that *St. Paul* never heard of, when he said, *Who goeth to War* ^{1 Cor. 9. 7.} *at his own charge?*

D 3

CHAP.

C H A P. IV.

Of Piracy.

- I. *Pirates what.*
- II. *Of the duty incumbent on Princes and States as in reference to such, and whether liable for the damages they commit.*
- III. *Pirates where they hold a Society, how the same is esteemed in Law, and of Equality held by them.*
- IV. *Whether capable of the Solemnities of War, and Right of Legislation.*
- V. *Whether capable of succour by the Laws of Nations.*
- VI. *Ships where liable for redemption of the Master remaining pledge for Ship and Lading, and where not.*
- VII. *Oath given to pay a reward for redemption of a Ship from Pirates, whether the same ought to be performed.*
- VIII. *Foreigners spoiled by English Pirates, may pursue for Justice within the Statute of 28 H. 8.*
- IX. *So where the Subjects of any Foreign Nation committing the same, may be punished by the same Statute.*
- X. *Piracy committed by the Subjects of a Nation in Enmity with the Crown of England among English Pirates, cannot be punished by the Statute of 28 H. 8.*
- XI. *Committed on the British Seas punishable by the Crown of England, and none other.*
- XII. *Where committed in the Ocean, whether they may be executed without tryal, by the Law of Nature.*
- XIII. *The like where the Judge refuses to try them, or in case of emergency, whether Justice may be executed immediately.*
- XIV. *Pirates attempting to rob, commit a Murder, whether all principals, or only the slayer, and the rest Accessories.*
- XV. *If the Subjects of one Foreign Nation rob another, and bring the Booty into England, whether the party injured may proceed Criminaliter for punishment, and Civiliter for restitution.*
- XVI. *Pirates take Men, and no part of the Lading, if Piracy.*
- XVII. *Where a Master may commit Piracy of those things that are committed to his charge, and where not.*
- XVIII. *Where Piracy may be, though there be nothing taken: and where Goods are taken out of a Ship, and no body in it.*
- XIX. *The Captain and Crew of a Vessel having a Commission of Rreprize commit Piracy, whether those that employed them ought to answer the damage.*
- XX. *Where Goods taken at Sea amount not to Piracy.*
- XXI. *Goods taken and retaken by a Friend, whether the property of the Prize is altered.*
- XXII. *Of Restitution of Goods taken by Piracy by the Laws of England.*
- XXIII. *Of Restitution refused by the Laws of England.*
Justifications in this by a Warrant from the Admiralty. The Admiralty must allow the Stat. of Limitation if pleaded.
- XXIV. *Of Piracy as in reference to matters Criminal, and how punishable at this day by the Laws of England.*
- XXV. *The Statute of 28 H. 8. how it operates in cases of Piracy.*
- XXVI. *Of Pardons in cases of Piracy, Forfeitures, Corruption of Blood, and Clergy.*
- XXVII. *Whether a Depredation committed in a Port within this Realm remains Robbery, at the Common Law, or Piracy by the Law Marine.*
- XXVIII.

XXVIII. Whether Clergy is allowable for a Depredation in a Port, and if Pardons touching the same.

XXIX. A Pirate arraigned and standing mute shall have Judgment of Pain, Fort and Dure.

XXX. Of the operation of the Attainder in cases of Piracy.

XXXI. Of Goods taken at Sea and brought to Land, whether the party is punishable by our Law.

Stat. 11. 12. W. 3. c. 7. Pira-

cy where and how Triable.

XXXII. If the Admiralty claims either an original, or a concurrent Jurisdiction, the Courts above will not intermeddle.

XXXIII. Satisfaction of old, how made to Persons spoiled at Sea.

XXXIV. Persons unjustly detained in custody upon suspicion of Piracy the Courts above on a Habeas Corpus may, if there be just cause, either bail or discharge them.

I. A Pirate is a Sea-Thief, or *Hostis humani generis*, who to enrich himself, either by surprise or open force, sets upon Merchants and others trading by Sea, ever spoiling their Lading, if by any possibility they can get the mastery, sometimes bereaving them of their Lives, and sinking their Ships; the Actors wherein, Tully calls Enemies to all, with whom neither Faith nor Oath is to be kept. Against Pirates and such as live by Robbery at Sea, any Prince hath power to make War, tho' they are not subject to his Government. *Grot. de jure belli & pacis. lib. 2. cap. 20. § 40.*

II. By the Laws of Nature Princes and States are responsible for their neglect, if they do not provide Ships of War, and other remedies for the restraining of those sort of Robbers; but how far they are bound, either by the Civil Law or Common Law of this Kingdom, may be some question: for it is agreed they are not the cause of the unjust spoil that is committed by them, nor do they partake in any part of the plunder; but if a Prince or State should send forth *Ships of War*, or Commissions for reprisal, and those instead of taking prizes from the Enemy, turn Pirates and spoil the Subjects of other Friends, there has been some doubt, whether they ought not to make satisfaction to the Parties injured, in case the offenders should prove unable; surely there is no more reason for this latter than the first; seeing Princes and States may give all their subjects power to spoil the Enemy, nor is such a Permission any cause why damage was done to our Friends, when even private Men, without any such permission, might send forth *Ships of War*; besides it is impossible that Princes or States should foresee, whether

If the offenders could be found, they ought to be yielded up to Justice; and if they have any Estate, the same ought to go towards the reparation of the damage.

Caution is commonly taken upon the giving forth of such Commissions to

prevent the same, if possible. They are generally restrained by Proclamation when a War breaks forth, and commanded that none presume to set forth without a Commission.

* *Constit. Gallicana tom. 3 tit. 3. Constitutione Anni 1583. cap. 44. Vide etiam tom. con-*

stit. 3. tit. 2. constit. Anni 1543. cap. 44. Vide 21. Article at the Treaty at Breda between England and Holland, and the 15. Article in the Marine Treaty at London 1674. † Trin. 7. Jac. in B. R. 1 Rolls Abr. fol. 530. Vide Sir Francis Moor's Reports. 1 Jac. Waltham versus Mulgar. 776.

they would prove such or not; nor can it be avoided, but we must imploy such, otherwise no *Army* or *Fleet* could be prepared; neither are Kings to be accused if their Soldiers or Mariners wrong their Confederates, contrary to their commands, though they are obliged to punish and yield up the Offenders, and to see that legal reparation be made out of the Estate of the Pirates. If *Letters of Marque* or *Reprizal* be granted out to a Merchant, and he furnishes out a Ship with a Captain and Mariners, and they instead of taking the Goods or Ships of that Nation against whom their *Commission* is awarded, take the Ships and Goods of a Friend, this is *Piracy* *; and if the Ships arrive in *England*, or in any other of His Majesties Dominions, the same shall be seiz'd, and the Owners for ever lose their Vessel †.

From hence it is, that Princes and States are very cautious upon this we call *Fure Belli privati*, how they engage themselves, or those who seek reparation for wrongs before received; for the Person *injured* governs not the action, but devolves the power to some other hired for that particular use, whose Law is no more than this, *There is most right where is most pay or prize*. Unhappy state of man, whose support and living is maintained only by exposing himself to Death, a Calling that nothing can make honest, but the highest necessity or pious charity. And therefore those that issue forth such sort of *Commissions*, generally take Caution for their returning within a convenient time, and not to wander in that unhappy condition.

leg. Hostes de reib. signif.

III. Though Pirates are called Enemies, yet are they not properly so termed: For he is an Enemy, says Cicero, who hath a Commonwealth, a Court, a Treasury, Consent and Concord of Citizens, and some way, if occasion be, of Peace and League; and therefore a Company of Pirates or Freebooters are not a Commonwealth, though perhaps they may keep a kind of equality among themselves, without which no Company is able to consist; and though it is seldom

dom they are without fault, yet they hold society to maintain *right*, and they do right to others, if not in all things according to the *Law of Nature* (which among many people is in part obliterated) at least according to *agreements* made with many other Nations: or according to Custom: So the *Greeks* at what time it was accounted lawful to take spoil at Sea, abstained from slaughter and depopulations, and from stealing Oxen that plowed, as the *Scholias*t upon *Thucydides* observes, and other Nations living also upon the spoil when they were come home from Sea, sent unto the Owners to redeem (if they pleased at an equal rate) what they were robbed of at Sea: and at this day, if a Ship hath the Emperor of *Barbary's* protection, the Pirates of that Nation (if they seize) will restore, and if there be no protection, yet if taken within *sight* of their Castles, the Prize is not absolute; but if resistance is made, and there be a Caption, she then becomes the Captor's for ever, *as the price of Blood*.

IV. Again, Pirates that have reduced themselves into a Government or State, as those of *Algier*, *Sally*, *Tripoli*, *Tunis*, and the like, some do conceive ought not to obtain the Rights or Solemnities of War, as other Towns or places: for though they acknowledge the Supremacy of the * *Port*, yet all the power of it cannot impose on them more than their own Wills voluntarily consent to. The famous *Carthage* having yielded to the Victorious *Scipio*, did in some respect continue, and began to raise up her drooping Towers, till the knowing *Cato* gave Counsel for the total extirpation; out of the Ruines of which arose *Tunis*, the revenging Ghost of that famous City, who now, what open Hostility denied, by Thieving and Piracy continue; as stinking Elders spring from those places where noble Oaks have been fell'd; and in their Art are become such Masters, and to that degree as to disturb the mightiest Nations on the Western Empire; and though the same is small in bigness, yet it is great in mischief: the consideration of which put fire into the Breast of the aged *Lewis IX.* to burn up this nest of Wasps, who having equipt out a fleet in his way for *Palestine*, resolv'd to besiege it: whereupon a Council of War being called, the question was, Whether the same should be summoned, and carried, it should not; *for it was not fit the solemn Ceremonies of War should*

Leg. Hostis de Captivis.

Grot. de Jure belli & pacis lib. 2. c. 18 §. 2.

* *Constantinople*, generally so called.

Fuller's Holy War lib. 4. cap. 27.

should be hatched away on a company of Thieves and Pirates.
 Notwithstanding this, *Tunis and Tripoli and their Sister*
Algier do at this day (though nests of Pirates) obtain the
right of Legation, and Sir John Lawson did conclude a
Peace between his Majesty by the Name of the most
Serene and Mighty Prince Charles the Second, by the Grace
of God King of Great Britain, France, and Ireland, De-
fender of the Faith, &c. and the most Excellent Signiors Ma-
homiet Bassaw, the Divan of the Noble City of Tu-
nis; Hagge Mustapha Dei, Morat Dei, and the rest of the
Soldiers in the Kingdom of Tunis: and with them of Tri-
*poli by Sir John Narborough * by the Name of Halil Ba-*
shaw, Abraham Dey, Aga, Divan, and Governours of the
Noble City and Kingdom of Tripoli in Barbary. So that
now (though indeed Pirates) yet having acquired there-
putation of a Government, they cannot properly be e-
steemed Pirates but Enemies.

October. 5. Anno
1662. But by
the Turk in
these words,
confirmed and
Sealed in the
presence of
Almighty
God, in our
House in the
noble City of
Tunis, the last
day of the
Moon Delcadi
and the year
of Hegira
1085.

* *Mar. 5. 1672*

and (afterwards, May 1. 1676. by the Turks) being the 26th. day of the Moon Zabire, and the year of the Hegira 1087.

Tacit. Annal. 3.
Cesar lib. 3. de
Bello Civ.

Hist. Republ.
Venet. fol. 91.

Leg. ad Legem
Rhod. de jactu.
l. 2. §. si navis
à Piratis re-
empta.

V. Pirates and Robbers that make not a Society, i. e. such a Society as the Law of Nations accounts lawful, are not to have any succour by the Law of Nations. *Tiberius*, when *Tacfarinas* had sent Legates to him, he was displeased that both a Traitor and a Pirate should use the manner of an Enemy, as *Tacitus* hath it; yet sometimes such men (Faith being given them) obtain the right of Legation, as the Fugitives in the *Pyrenean Forest*, and the *Banditti* at *Naples*; and *Solyman* the Magnificent, having entertained *Barbarossa* the famous Pirate, sent word to the *Venetians*, that they should use him and esteem him no more as a Pirate, but one of their own Port.

VI. If a Ship is assaulted by a Pirate, for redemption of which the Master becomes a Slave to the Captors, by the Law Marine the Ship and Lading are tacitly obliged for his redemption by a general contribution. But if a Pirate shall feign himself stronded, and to decoy the Merchant Man for his relief, shall fire his Guns, or wave his Colours, who accordingly varies his course for his assistance, and the Pirate enters him, for redemption of which he becomes a Slave to the Pirate, there contribution shall not be made, because it was his folly to be so decoy'd.

II. By

II. By the *Civil Law* a Ransom promised to a Pirate, if not complied with, creates no wrong, and the reason given is, for that the Law of Arms is not communicated to such, neither are they capable of enjoying that privilege which lawful Enemies may challenge in the Caption of another : however this hath its measure ; for a Pirate may have a lawful possession, the which he cannot be denied (if injury or wrong be done him) to claim the benefit of Law, but the reason of that springs from a more noble Fountain, which is his taking a legal course, for by that he hath submitted to the Magistrate, and paid obedience to the Laws in demanding Justice ; besides, the same is not done so much in favour of the Pirate as in hatred of him who first commits the wrong. *Augustus* the Emperor having proclaimed a reward of ten Sesterces to be given him that should bring in *Coracotas* the famous *Spanish* Pirate, who having notice of the same, voluntarily comes and presents himself before the Emperor, and demands the promised reward, and the question was, whether death or the Sesterces were to be his reward : The Emperor gave Judgment, that the sum promised, should be paid him, for otherwise in taking away his life he should deceive him of the sum promised, which would, in effect, violate the publick Faith given to him, who of himself offered himself upon the tryal of Justice.

Bodin. l. 1. c. 1.

A Pirate attacks a Merchant-Man, and enters her, for redemption of which the Master gives his Oath, at a time and place to pay the Pirate a Sum certain ; by some it hath been held, that the Master commits not perjury, if the price promised for redemption be not brought according to the Oath, because a Pirate is not a determinate, but a common Enemy of all, with whom neither Faith nor Oath is to be kept : but that is no reason for the assailing of the Vow : for though the Person be deficient, yet the Just God is concerned ; nor can that person that hath promised a thing, satisfy his Conscience after he hath once delivered it to him, to recover it back again ; for the words in an Oath, as to God, are to be understood most simply, and with effect ; and therefore he that returned secretly to the Enemy, and again departed, made not good his Oath concerning his Return.

*Leg. bona fide
D. Expos.*

On a Com-
mission
grounded on
the Stat. a-
warded. Rott.
Adm. 28 Eliz.
m. 23.

VIII. If an *English Man* commit Piracy, be it upon the Subject of any Prince or Republick in amity with the Crown of *England*, they are within the purview of the Stat. of 28 H. 8 and so it was held where one *Winter-son, Smith*, and others, had robbed a Ship of one *Maturine Gantier*, belonging to *Bordeaux*, and bound from thence with *French Wines* for *England*, and that the same was Felony by the Law Marine, and the parties were convicted of the same.

Rott. Adm. an-
no 28 Eliz. m.
24.

IX. And so it is if the Subject of any other Nation or Kingdom, being in amity with the King of *England*, commit Piracy on the Ships or Goods of the *English*, the same is Felony, and punishable by virtue of the Stat. and so it was adjudged, where one *Careless*, Captain of a *French Man* of War of about 40 Tuns, and divers others, setting upon four Merchant Men going from the Port of *Bristol* to *Caermarthen*, did rob them of about 1000 l. for which he and the rest were arraigned, and found guilty of the Piracy.

Normandy was
lost by King
John, and out
of the lige-
ance of the
King of Eng-
land, and they
were as now
accounted A-
liens, 42. Af-
ff. place 25. per
Shard. Vid.
2 H. 5. cap. 6.

But before the Stat. of 25 Ed. 3. if the subjects of a Foreign Nation and some *English* had joined together, and had committed Piracy, it had been Treason in the *English*, and Felony in the Foreigners: And so it was said by *Shard*, where a *Norman* being Commander of a Ship, had, together with some *English*, committed Robberies on the Sea, being taken, were arraigned and found guilty; the *Norman* of Felony, and the *English* of Treason, who accordingly were drawn and hang'd. But now at this day they both receive Judgment as Felons by the Laws Marine.

X. If the Subjects in enmity with the Crown of *England* be Sailors aboard an *English Pirate* with other *English*, and then a Robbery is committed by them, and afterwards are taken, it is Felony without controversie in the *English*, but not in the *Strangers*; for they cannot be tried by virtue of the Commission upon the Statute, for it was no Piracy in them, but the depredation of an Enemy, for which they shall receive a Trial by Martial Law, and Judgment accordingly.

Selden Mare
Clauf. lib. 1.
cap. 27. Case of

XI. Piracy committed by the Subjects of the *French* King, or of any other Prince or Republick, in amity with the Crown of *England* upon the *British* Seas, are punish-

unishable properly by the Crown of England only, for the Kings of the same have *istud regimen & dominium ex-* Reginr Grim- bald in temper. Ed. 1. Cited in 4. Inst. fol. 142. in c. of the Admiralty.
clusive of the Kings of France, and all other Princes and
states whatsoever.

XII. If Piracy be committed on the Ocean, and the Pi-
 rates in the Attempt there happen to be overcome, the
 Captors are not obliged to bring them to any Port, but
 may expose them immediately to punishment, by hang- Injicere manus
parca traxe-
runt debitum
sibi, & sermone
usus est juris;
nam manus in-
 ing them up at the Main-yard end before a Departure; jectio dicitur,
quoties nulla
judicis auctori-
tate, rem nobis
debitam vindi-
camus.
 or the old natural liberty remains in places where are
 no Judgments. Serv. Æn. 11.

And therefore at this Day, if a Ship shall be on a Voy-
 age to the *West-Indies*, or on a Discovery of those Parts
 of the unknown World, and in her way be assaulted by
 a Pirate, but in the Attempt overcomes the Pirate, by
 the Laws Marine, the Vessel is become the Captors;
 and they may execute such *Beasts of Prey* immediately,
 without any Solemnity of Condemnation. If we re-
 spect expletory Justice, it cannot be denied, but for the
 Conservation of Ship and Goods, a Pirate invading
 may be slain, for the inequality between these things
 and life is made up in favour of the innocent, and
 by hatred to the injurious: Whence it follows, if we
 regard only that Right, that a Pirate running away
 with stolen Goods, if they cannot otherwise be reco-
 vered, may be sunk. *Demosthenes* said, *It was very hard*
and unjust, and contrary both to the written Laws and
the common Rules amongst Men, not to be suffered to use
force against him who in a hostile manner hath taken my
goods. Oratione in A-
ristocratem.

XIII. So likewise, if a Ship shall be assaulted by Pirates,
 and in the Attempt the Pirates shall be overcome, if the
 Captors bring them to the next Port, and the Judge open-
 ly rejects the Tryal, or the Captors cannot wait for the
 Judge without certain peril and loss, Justice may be done
 upon them by the Law of Nature, and the same may be
 there executed by the Captors. Leg. extat. D.
quod metus.
Honorius &
Theodosius; id-
circo Judicio-

*om vigor Jurisque publici tutela in medio constituta, ne quisquam sibi ipsi permittere
 liceat ultionem. Leg. nulli C. de Judais.*

Caius Cæsar being but a private Man pursued the Pi-
 rates, by whom he formerly had been taken and spoiled
 by

*Plutarch. in
Cæsar.*

by them, and making up to them with such a Fleet as he possibly in haste could get ready, attacked, burnt, and destroyed their Ships, and the Men he brought back to an Anchor, where repairing to the *Proconsul* to do Justice, and he neglecting, himself turned back, and there hang'd them up.

* *Ralph Williams* indicted for the murder of one

John Terrey;

and *Bridger, Black,* and others as Accessories. *Rot. Admir. 28. Eliz. M. 24. † Norton fol. 134, 135.*

XIV. If a Pirate at Sea assault a Ship, but by force is prevented entering her, and in the attempt the Pirate happens to slay a person in the other Ship, they are all *Principals* in such a Murder, if the *Common Law* hath Jurisdiction of the cause: but by the *Law Marine*, if the parties are known, they who gave the wound only shall be *principals*, and the rest *accessories* *; and where they have cognizance of the principal, the Courts at *Common Law* will send them their accessory, if he comes before them †.

*Res quæ intra
Præsidia perdu-
ctæ nondum
sunt, quanquam
ab hostibus occu-
patæ, dominum
non mutarunt
ex Gentium ju-
re. Grotius de
Jure belli ac
Pacis. c. 9. §.
16.*

* *Trin. 17 Car.*
in B. R. Mar-
sh's Reports

110. † *Leg. Hostes & Leg. Latrones D. de Cap. Leg. postlim. à Piratis cod. Tit.*

XV. If a *Spaniard* robs a *French Man* on the High Sea, both their Princes being then in amity, and they likewise with the King of England, and the Ship is brought into the Ports of the King of England, the *French Man* may proceed *Criminaliter* against the *Spaniard* to punish him, and *Civiliter* to have Restitution of his Vessel: but if the Vessel is carried *infra Præsidia* * of that Prince, by whose Subject the same was taken, there can be no proceeding *Civiliter*, and doubted if *Criminaliter*; but the *French-Man* † must resort into the Captor's or Pirate's own Country, or where he carried the Ships, and there proceed.

The Caption
was in 1665.
Adjudication
passed May 13.
1670. upon
which there
was an Appeal
to the Duke
of York; but
nothing came
of it.

A *Dutch-Man*, but naturalized by the Duke of Savoy, and living at *Villa Franca*, in his Dominions, procures a *Commission* from the States of *Holland*, and coming to *Le-ghorn*, there rid with the Colours and Ensigns of the Duke of Savoy; the Ship *Diamond* being then in Port, and having received her lading, was afterwards in her Voyage home surprised by that Capter, and brought into *Villa Franca*, and there condemned and sold to one *Poleman*; which Ship afterwards coming for *England*, the Plaintiffs having

Notice

Notice, made a seizure, and upon Tryal Adjudication *Rott. Admir. in An. Supradict.* passed for the Plaintiffs, the original Proprietors: For tho' the Ship of War and the Captors were of Savoy, and carried thither; yet being taken by virtue of a Dutch Commission, by the Law Marine, she must be carried *infra Præsidia* of that Prince or State by virtue of whose Commission she was taken. Nor can such carrying of the Ensigns or Colours of the Duke of Savoy, who was then in amity with the Crown of England, or the Commander, though a subject of that Prince, make him a Pirate, or subject them or those to whom they have transferr'd their interest of the prize, any ways to be questioned for the same Criminaliter; for that the original *quoad* the taking was lawful, * as one Enemy might take from another; * *Bulstrode. 3. but Civiliter* the same might be, for that the Captor had not entituled himself to a firm possession †. And therefore in all cases where a Ship is taken by Letters of Marque or Piracy *, if the same is not carried *infra Præsidia* of that Prince or State by whose Subject the same was taken, the Owners are not divested of their Property, but may re seize wheresoever they meet with their Vessels. *Case of Samuel Pellag. Grotius de jure belli ac pacis. lib. 3. cap. 9. §. 15. & 16. Mich. 8. Fac. in B. R. Brownlow 2. part. Westons C.*

XVI. If a Pirate attacks a Ship, and only takes away some of the Men, in order to the selling them for slaves, this is Piracy by the Law Marine; but if a Man takes away a Villain, or Ward, or any other Subject, and sells them for slaves, yet this is no robbery by the Common Law. *C. 2. Inst. 109. lib. 8. fol. 32. 6. Galeys C. but Black Mail and such sorts of taking in*

Cumberland, Northumberland, and Westmorland was Felony 43. *Eliz. cap. 13.*

XVII. If a Bale or Pack of Merchandise be delivered to a Master to carry over Sea to such a Port, and he goes away with the whole Pack or Bale to another Port, and there sells and disposes of the same, * the same is no Felony. But if he opens the Bale or Pack, and take any thing out, *animo furandi*, the same may amount to such a Larceny, as he may be indicted in the Admiralty, though it amounts not to a Piracy. Yet if such a Master of Ship shall carry the Lading to the Port appointed, and after retakes the whole Pack or Bale back again, this may amount to a Piracy; for he being in the nature of a Common Carrier, the

* ff. Nautæ
Caup. l. 1. sect.
3. Stab. Glan-
vil lib. 10. cap.
13.
13 Ed. 4. 9.
Nautæ Caup.
Stab. lib. sect. 7.
sect. receptis.

Ca. 3. Inst.

107, 108.

44 E. 3. 14.

4 H. 4. 2.

S. ad Leg. Rhod.

de jact. l. 2. §.

si navis à Pi-

ratis redempta

sit.

14 E. 3. Cor.

115.

Trin. 7 Jac. in

B. R. Rolls A-

bridg. 530.

Constit. Gallia

rom. 3. tit. 3.

mactit. anni

1583. c. 44.

Vide Sir Fran-

cis Moor's Re-

ports Wal-

tham vers.

Mulgar. 776.

Vide the very

Letters of Re-

prizal in Cap.

2. Letters of

Marque fol.

32.

Hill. 30, 31.

Cor. 2. at Ser-

geants Inn.

Vid. l. 1. c. 2.

§. 15.

the delivery had taken its effect, and the Privy of the Balement is determined.

XVIII. If a Pirate shall attack a Ship, and the Master for the Redemption shall give his Oath to pay a Sum certain; though there be no taking, yet is the same Piracy by the *Law Marine*; but by the *Common Law* there must be an actual taking, though it be but to the value of a Penny, as to a Robbery on the High-way.

If a Ship shall ride at Anchor, and the Mariners shall be part in their Ship-boat, and the rest on the shore, and none shall be in the Ship; yet if a Pirate shall attack her and rob her, the same is Piracy.

XIX. A Merchant procures Letters of *Marque* or *Reprise*, and then delivers the Commissions to persons to endeavour a satisfaction; if such persons commit Piracy, the Vessel is forfeited without controversie: But the Merchant is no ways liable to make satisfaction; for though the Superior shall answer for the Actions of his Ministers or Servants, yet that is introduced by the *Civil Law*; but this question must be decided by the *Law of Nations*, by virtue of which such Commissions are awarded or granted, the which does exempt any Man to answer for the Damages of his Servants, unless he foreknew that they would commit such a Piracy or Spoliation, or any way have abetted or consented to the same, which right may be forfeited, and the *Civil Law* let in to acquire satisfaction: And yet in the Case of Sir Edmond Turner, and Mr. George Carew, who having Letters of Reprizal against the Dutch, Mr. Carew by Indorsement on the back-side of the Letters Patents did nominate and appoint one Tyrence Byrne to execute and perform all such acts and things as by force of the Letters Patents he might lawfully do: Tyrence Byrne provides Ship and Crew, and being at Sea takes a certain Ship belonging to Bruges called the *Godelife*, and there was some probable cause of suspicion, yet not enough to warrant a Condemnation: Whereupon the Owners having had sentence of Restitution libell'd in the *Admiralty* against Sir Edmond Turner, Mr. Carew and Byrne, for Damages; upon which a Sentence was given against the Defendants, who Appealing, the Delegates confirmed the first Sentence.

XX. But if a Ship shall be at Sea and in necessity, if she attacks another Ship, and takes out some Victuals, Cables, Ropes, Anchors or Sails, (especially if that other Ship may spare them) this is not *Piracy*; but then the Party must pay ready Money for such things, or give a Note or Bill for the payment of the value, if on this side the *Straits of Morocco*, within four Months, if beyond within twelve Months.

XXI. By the *Law Marine*, if Goods are taken by a Pirate, and afterwards the Pirate attacks another Ship, but in the Attempt is conquered, the *Prize* becomes absolutely the Captor's, saving the account to be rendred to the *Admiral*. And it is accounted in Law a just Caption of whatsoever may be got or taken from such *Beasts of prey*, be the same in their own or in their Successors Possession. But then an account ought to be rendred to the *Admiral*, who may (if they happen to be the Goods of the Fellow-subject of the Captors, or of Nations in amity with his own Sovereign) make restitution to the Owner, the costs and charges, and what other things in equity shall be decreed to the Captor, first considered and deducted.

XXII. By the *Statute of 27 Edw. 3. cap. 13.* if a Merchant lose his Goods at Sea by Piracy, or Tempest (not being wrackt) and they afterwards come to Land; if he can make proof they are his Goods, they shall be restored to him in places *Guildable*, by the King's Officers and six Men of the Country; and in other places by the Lords there and their Officers, and six Men of the Country. If a Pirate takes Goods upon the Sea, and sell them, the Property is not thereby changed no more than if a Thief upon the Land steals them and sells them. *Godb. 193. Barber's Case.*

This Law hath a very near relation to that of the *Romans*, called *De Usu-Captione* or the *Atinian Law*; for *Atinius* Enacted, That the Plea of Prescription or long possession, should not avail in things that had been stoln, but the Interest which the right Owners had should remain perpetual; the words of the Law are these, *Quod arreptum est, ejus rei aeterna auctoritas esset*, where by *Auctoritas* is meant *Jus Dominii*.

Leg. 2. sect. cum in eadem: D. ad l. Rhod. Leg. quo naufrag. S. quod ait. D. de incen. Leg. quemadmodum, sect. item D. ad Leg. Aquilian. 27 H. 8. cap. 4. S. 4. Per Leg. Pomponius de acqu. rei dom.

Per Leg. Mulier, ea. cap. 6. post.

27 E. 3. c. 13. 3 Bul. 28, 29. March 1101.

Sigonius de Jus. re Rom. l. 11. c. 11.

Mich. 13. Fac.
in B. R. Sir Ri-
chard Bingley's
Case 1. Roll's
Abridgment,
fol. 530. Lit.
C. 4. Grotius de
Jure belli &
pacis lib. 3. c.
9. sec. 16.

(a) This is a Report of two Cases where a prohibition was granted, because the contract was made on Land and under Seal: and so not to the purpose. See *vid. Cro. El. 685. Yelv. 173. 1 Sid. 320, 367. 2 Saund. 260. Lev. 25. 1 Ven. 173, 308.* Where it is held that if the Admiral hath Jurisdiction of the Orig. Cause, the Matters depending thereon shall be tried in the Admiral's Court, tho' they arise on the Land.

XXIII. Yet by the *Common Law of England*, it has been held, That if a Man commit Piracy upon the Subjects of another Prince or Republick (though in League with us) and brings the Goods into *England*, and sells them in a Market Overt, the same shall bind, and the owners are for ever concluded, and if they should go about in the *Admiralty* to question the Property, in order to Restitution, they will be prohibited. (a) *Hob. 79.*

In Trover for Goods of 400 *l.* value, Motion was for a Trial at Bar, the Goods being taken by a *Spanish* Caper, and brought into *Plymouth*, and from thence Shipt away without Condemnation, because tho' *Br. Property* 38. says the Property is altered by the Enemy's possession above 24 hours, which is good when they are brought into safe Port of an Enemies Country, yet the constant Opinion of the *Civilians* and the Practice at *Guildhall* in the *Dutch* War, is that if such Goods be brought into a Neutral Port, or, as these were into a Friend's, the Property is not altered till Condemnation, and these Goods were taken from a *French* Man in League with us, which is stronger, and this being matter of Evidence, tho' the Defendant was only a Factor in *England* could not condemn the Goods, but the condemnation was in *Holland*, whither they were Shipt; yet the Tryal at Bar was granted. 3. *Keeble* 397. *Verdale con. Marten.* Like Case *Radley* and *Delbow* against *Eglesfield & als.* *Laws of the Sea* 426.

Several Persons were Owners of a Ship, which they sent to the *Indies* to Merchandize, upon the High Sea the Mariners and Residue commit Piracy. Upon the Return of this Ship to the River of *Thames* the Admiral seiz'd her, as *Bona Pyratarum*, the Merchants took the Sails and Tackle out of the Ship. The Admiral shall not have the Goods stoln from other Men, but the Owner shall have them. 1. *Roll. Rep. 285.* the Case of *Hildebrand* and others.

XXIV. This offence was not punishable by the *Common Law*, as appears by the Preamble of the *Stat. of 28 H. 8. cap. 15.* but the same was determined and judged by the *Admiral*, after the course of the *Civil Law*; but by force of the said *Act*, the same is inquired of, heard, and deter-

terminated according to the course of the *Common Law*, as if the offence had been committed on *Land*.

Stat. 11. and 12. W. 3. cap. 7. All Piracies, Felonies, Tryal of Piracy and Robberies committed in or upon the Sea, or in any Haven, River, Creeks, or Place where the Admiral hath Jurisdiction, may be tryed at Sea, or upon the Land, in any of his Majesties Islands, Plantations, Colonies, &c. appointed for that purpose by Commission under the Great Seal of *England*, or Seal of the Admiralty directed to such Commissioners as his Majesty shall think fit, who may commit such Offenders and call a Court of Admiralty thereupon to consist of 7 Persons at the least.

And for want of 7, then any 3 of the Commissioners may call others as therein is mentioned.

The Persons so assembled may proceed according to the course of the Admiralty, and give Sentence of Death and award execution of the Offenders, who shall thereupon suffer Loss of Lands, Goods and Chattels.

The Register of the Court, or if none be, the President to take Minutes of the Proceedings and transmit the same to the Admiralty Court in *England*.

If any natural born Subjects or Denizens of *England* commit Piracy or any act of Hostility against any of his Majesty's Subjects at Sea under Colour of a Commission or Authority from any Foreign Prince or State or Person whatsoever, such Offenders shall be adjudged Pyrates.

If any Commander or Master of a Ship, a Sea-man or Mariner turn Pirate, or give up his Ship, &c. to Pirates, or combine to yield up, or run away with any Ship, or lay violent Hands on his Commander, or endeavour to make a Revolt in the Ship, he shall be adjudged a Pirate and suffer accordingly.

All Persons who after the 29th of September 1700 shall set forth any Pirate (or be aiding and assisting to any such Pirate) committing Piracy on Land or Sea, or shall conceal such Pirate, or shall receive any Vessel or Goods, Piratically taken, shall be adjudged Accessory to such Piracy, and suffer as Principals, according to the State of 28 H 8. which is hereby declared to be in force. When any *English* Ship shall have been defended by

Fight against Pirates, and any of the Officers or Seamen killed or wounded, the Judge of the Admiralty or his Surrogate in *London*, or the Major, or chief Officer in the Out-Ports, assisted by 4 Substantial Merchants, may by Process out of the said Court levy upon the Owners of such Ships, &c. a Sum not exceeding 2 *l.* per Cent. of the Value of the Freight, Ship and Goods so defended, to be distributed among the Officers and Seamen of the said Ships, or Widows and Children of the slain.

A Reward of 10 *l.* for every Vessel of 100 Tuns or under, and 15 *l.* for every Vessel of a greater Burden shall be paid by the Captain, Commander or Master, to the first Discoveror of any combination for running away with, or destroying any such Ship at the Port where the Wages are to be paid.

The Commissioners aforesaid shall after the 29th of *September* 1700. have the sole power of trying the said Crimes, and Offences within the Colonies and Plantations in *America* governed by Proprietors, or under Grants or Charters from the Crown, and may issue their Warrants for apprehending such Pirates, &c. and their Accessories in order to their being tried there, or sent into *England*.

Commissions for Tryal of the said Offences sent to any Place within the Jurisdiction of the Cinque Ports, shall be directed to the Lord Warden of the Cinque Ports, or his Lieutenant, and such Persons as the Lord Chancellor shall appoint; and the Tryal to be by the Inhabitants of the Cinque Ports.

All Seamen, Officers and Sailors who shall desert the Ships or Vessels, wherein they are hired for a Voyage shall forfeit their Wages.

If any Master of a Merchant Ship or Vessel shall after the 29th *September* 1700. during his being abroad force any Man ashore, or wilfully leave him behind, or refuse to bring all his Men home again, who are in a Condition to return, he shall suffer 3 Months Imprisonment.

XXV. This Act does not alter the Offence, or make the Offence Felony, but leaves the offence as it was before this Act, viz. Felony only by the *Civil Law*, but giveth a mean of Tryal by the *Common Law*, and inflicteth pains

pains of Death, as if they had been attainted of any Felony done upon the Land. The Indictment must mention the same to be done upon the high Sea.

XXVI. A Pardon of all Felonies does not extend to this Offence, but the same ought *especially* to be named; and tho' there be a Forfeiture of Lands and Goods, yet there is no *corruption* of Blood, nor can there be an Accessory of this Offence, tryed by virtue of this Statute; but if there be an Accessory upon the Sea to a Piracy, he must be tryed by the Civil Law.

The Statute of 35 H. 8. cap. 2. taketh not away this Statute for Treasons done upon the Sea, nor is Clergy allowable to the Party on the Statute 28 H. 8. vide 14 Jac. in B. R. Moore 756. plac. 1044. 3 Inst. 112.

XXVII. Though a Port be *Locus publicus uti pars Oceani*, yet it hath been resolved more than once, that all Ports, not only the Town, but the Water is *infra corpus Comitatus*.

If a Pirate enters into a Port or Haven of this Kingdom, and a Merchant being at Anchor there, the Pirate assaults him and robs him, this is not Piracy, because the same is not done *super altum Mare*; but this is a down right Robbery at the Common Law, for that the Act is *infra corpus Comitatus* and was inquirable and punishable by the Common Law, before the Statute of 28 H. 8. cap. 15.

distressed for it at the Common Law, and were found guilty of the same, Anno 22 Car. 2. at the Old Baily.

XXVIII. So if such a Piracy or Robbery be made in a Creek or Port, in such cases it has been conceived, that Clergy is allowable upon the Statute of 28 H. 8. but if it be done *super altum Mare*, there no Clergy is allowable; howbeit, if such a Robbery be committed on great Rivers within the Realm, which are lookt upon as common High-ways, there perhaps Clergy may not be granted, and so it was rul'd in the aforesaid Case of Hyde, who with a parcel of Men, came one Night in a Boat in the River of Thames, and under the Colour of Press-Masters, Boarded the Ship of one Captain Slue, and rob'd her, and for which being taken and tryed at the Old Baily, by the greater Opinion of the Judges there present, 22 Car.

ted Anno
1674. vide 19
E. 3. Cor. 124.
9 H. 4. 2.
Mo. 756. 1 Inst.
191. Dy. 308.

2. had Clergy denied him. By the Pardon of all Felonies, at the *Common Law*, or by the *Statute-Law*, *Felony super altum Mare* is not pardonable; for though the King may pardon this Offence, yet being no Felony in the eye of the Law of this Realm, but only by the *Civil Law*, the Pardon of all Felonies generally extends not to it; for this is a special Offence, and ought especially to be mentioned.

XXIX. One *Cobham* was arraigned in *Southwark*, before the Commissioners of Oyer and Terminer, for a Piracy and Robbery committed on a *Spaniard*, & *Stetit mutus & noluit directe respondere*; And it being moved by the Attorney General, whether he ought to have the Judgment of *pain fort & dure* in this Case, *Saunders* Chief Baron, *Brown* and *Dyer* were of Opinion he should, and that by the Words and reasonable Intendment of the Statute of 28 H. 8. c. 15. and according to the Opinion *supra*, the Judgment was given by *Carus* Serjeant. Dy. 241. pl. 49.

9 E. 4. 28. cited in Coke's 3.
112. fol. 112.

XXX. A Man attainted by virtue of that Statute, forfeits his Lands and Goods, yet there works *no corruption* of Blood, by virtue of that Attainder; nor can there be any Accessory of Piracy by the Law of this Realm; but if it falls out that there is an Accessory upon the Sea, such Accessory may be punished by the *Civil Law*, before the Lord Admiral, but he cannot be punished by virtue of this Act, because it extends not to Accessories, nor makes the Offence Felony.

28 Eliz. But-
ler's Case cited 3. Inst.
fol. 113.

XXXI. If one steals Goods in one County, and brings them into another, the Party may be indicted in either County; but if one commits Piracy at Sea, and brings the Goods into a County in *England*, yet he cannot be indicted upon the Statute, for that the original taking was not Felony, whereof the *Common Law* took cognizance.

Marsh's Case
13 Jac. in B. R.
3 Bulstrode f. 27.

XXXII. If a Man is taken on suspicion of Piracy, and a Bill is preferred against him, and the Jury find *Ignoramus*; if the Court of Admiralty will not discharge him, the Court of King's Bench will grant a *Habeas Corpus*, and if there be good Cause, discharge him or at least take Bail for him: But if the Court suspects that the Party is guilty, perhaps they may remand him; and therefore in all cases, where the Admiralty legally have an original, or a concurrent

concurrent Jurisdiction, the Courts above will be well informed before they will meddle.

Trespass for breaking a Ship, and taking away the Sails; the Defendant justified by warrant out of the Admiralty, by which he entred the Ship and took away the Sails. ^{Justification in Tres. by warrant of the Admiralty.} Objection the breaking is not answered, *per Curiam* its good enough, for the entry is a breaking in Law, as *Clauſum fregit &c.* And that he may carry away the Sails, because this is the manner of their proceedings, and grounded upon Reason, because the Ship cannot be kept safe, if the Sails be not carried away. *Creamer against Tokely Latch*, 188.

Suit in the Admiralty the Defendant pleaded the Statute of Limitation, if that Court deny the Plea, Prohibition will be granted, or if they do receive the Plea, but will not give Sentence accordingly, Prohibition will go. *Hardres* 502. *Berkly* 2nd *Morris*. ^{Statute of Limitation pleadable there.}

If a Man be in custody for Piracy, if any aids or assists him in his Escape, though that matter is an Offence at Land, yet the Admiralty having Jurisdiction to punish the principal, may have likewise power to punish such an Offender, who is lookt upon *quasi* an Accessory to the Piracy; but to rescue a Prisoner from an Officer of theirs, they may examine the cause, but they cannot proceed criminally against the Offender. ^{*Yelverton* 134. 135. *Scading's Case*, *Tench* *versus Harrison* B. R. *Stiles* 171, 340.}

XXXIII. Anciently when any Merchants were robbed at Sea, or spoiled of their Goods, the King usually issued out Commissions under the Great Seal of England, to enquire of such depredations and robberies, and to punish the parties; and for frauds in Contracts, to give Damages to the Parties, and proceed therein *secundum Legem & consuetudinem Angliæ, secundum Legem Mercatoriam, & Legem Maritimam*; all three Laws included in the Commissions. ^{50 *Eliz.* 3. par. 2 *Dors.* 24. *de audiend. & terminand. Mercatoribus super mare depredatis.* Pat. 6. E. 1. m. 24. *Dors.* the Case of *Will. de Dunstaple*, a Citizen of *Winton.* Pat. 32 E. 1. m. 4. *Dors.* pro *Willielmo Perin & Domingo Perez Mercatoribus.*}

XXXIV. The Courts of *Westminster* have a Sovereign power to enquire after the Liberty of every Man, and that he should not be deprived of the same without just cause; and therefore as in other Capital causes, so likewise in this they may send their *Habeas Corpus* to remove the Body ^{*Pasch.* 13. *fac.* in B. R. *King* *versus Marsh.* *Rustrod.* 3 par. fol. 27.}

dy of any committed upon such an account, and if they see a just cause, they may either bail, or discharge, or remand, as the matter shall seem just before them.

Coke 3 Instit.
fol. 113.

*Self Admir.

Feb 18. 1680.

Case of Comp-

t. n Gwyther.

& al.

And altho' the Statute of 28 H. 8. c. 15. does not alter the offence, or make the offence Felony, but leaveth the offence as it was before that Statute. (*viz.*) Felony only by the *Civil Law*, and gives a mean of Trial by the *Common Law*, and inflicted such pains of death as if they had been attainted of any Felony; yet it was resolved * by all the Judges, and the rest of the Commissioners then present, that his Majesty having granted Letters of Reprizal to Sir *Edmond Turner* and *George Carew*, against the Subjects of the *States General* of the *United Provinces*, and that afterwards that Grant was called in by Proclamation, then mortified in the Treaty of *Breda*, and afterwards superseded under the the Great Seal: That *Carew* (without *Turner*) having deputed several to put in Execution the said Commission, who accordingly did; and being indicted for Piracy, the same was not a Felonious and a Piratical Spoliation in them, but a Caption in order to an Adjudication; and tho' the Authority was deficient, yet not being done by the Captain and his Mariners, *animo deprædandi*, they were acquitted.

The Method to be observed by her Majesties Men of War, and Privateers in examining and securing Prisoners taken on board Privateers and Pirates, &c. by an order in Council of his late Majesty *Will. III.* Feb. the 3d. 1694.

C H A P. V.

The Right of the Flag, as to the acknowledging the Dominion of the British Seas.

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| <p>I. Considerations general as in reference to the same.</p> <p>II. Whether Princes may have an exclusive Property in the Sea.</p> <p>III. That such an exclusive Dominion may be, and proved.</p> <p>IV. Of the Sea, whether capable of Division as the Land.</p> <p>V. Considerations general, as in reference to Maritime Cities touching Sea Dominion.</p> <p>VI. Of the Sea, by reason of its instability, whether capable of Subjection.</p> <p>VII. Of the Dominion of the British Sea asserted long before, and ever since the Conquest of this Isle by the Romans.</p> <p>VIII. The Duty of the Flag, but a consecutive Acknowledgement of that Right, and of the Ordinance</p> | <p>of Hastings declaring that Customary obeisance.</p> <p>IX. Considerations had on some Treaties, in reference to asserting the Duty of the Flag.</p> <p>X. Of the extent how far that duty is required and payable.</p> <p>XI. Of the duty of the Flag, not a bare Honorary salute, but a Right.</p> <p>XII. Of the importance and value of the same, as well in Nations Foreign, as in England.</p> <p>XIII. Of the effects of such a Right and Sovereignty. Of the extent Of this Dominion by the Laws of England.</p> <p>XIV. Of the Duty of the Flag not regarded as Civility, but commanded as a Duty.</p> <p>XV. Of the importance of that acknowledgement.</p> |
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I. **A**fter the Writings of the *Illustrious Selden*, certainly it's impossible to find any Prince or Republick, or single Person indued with Reason or Sense, that doubts the Dominion of the *British Sea*, to be entirely subject to that *Imperial Diadem*, or the duty or right of the Flag, which indeed is but a consecutive Acknowledgement of that ancient Superiority: Yet there have not been wanting some, who though they have not questioned the former, have highly disputed the latter.

But there are some fatal Periods amongst our Northern Regions, when the Inhabitants do become so brutal and prejudicate, that no obligation of Reason, Prudence, Conscience, or Religion can prevail over their Passions, especially if they become the devoted Mercenaries of an implacable Faction†, in opposition to all that can be cal-
led † *Lowestem.*

led either just or honourable ; we need not rip up the Carriage of that late insolent Son of a *Tallow-Chandler*, whose Deportments made him no less insupportable at home, than he was amongst *Foreign Princes* ; the testimonies of his greatest Parts and abilities being no other than Monuments of his *Malice* and *Hatred* to this Nation, and Records of his own *folly*. But Princes are not to be wrangled out of their ancient *Right* and *Regalities* by the subtil Arguments of *Wit* and *Sophistry* ; nor are they to be supplanted or overthrown by *Malice* or *Arms*, so long as God and good Men will assist, in which his Sacred Majesty did not want, when he asserted his *Right* with the Blood and Lives of so many Thousands that fell in the dispute.

II. That Princes may have an *exclusive property* in the *Sovereignty* of the *several parts of the Sea*, and in the *passage*, *Fishing* and *Shores*, is so evidently true by way of fact, as no man that is not so desperately impudent can deny it : the Considerations of the general *practice* in all Maritime Countries, the necessity of *Order* in mutual Commerce, and the *Safety* of mens persons, goods, and lives hath taught even the most *Barbarous Nations* to know by the Light of *humane Reason*, that *Laws* are as equally necessary for the Government and Preservation of the Sea, as those that negotiate and trade on the firm Land ; and that to make *Laws* and to give them the *Life* of Execution, must of necessity require a *Supream Authority* ; for to leave every part of the Sea and Shores to an *Arbitrary* and *promiscuous Use*, without a correcting and securing Power in case of wrong or danger, is to make Men in the like Condition with the Fishes, where the greater devour and swallow the less.

III. And though the Sea is as the *High-way*, and common to all ; yet it is as other *High-ways* by Land or great Rivers are, which though *Common* and *Free*, are not to be usurped by private Persons to their own entire Service, but remain to the use of every one : Not that their Freedom is such, as that they shou'd be *without Protection* or Government of some Prince or Republick, but rather not exclude the same ; for the true Ensign of Liberty and Freedom is *Protection from those that maintain it in liberty*.

See that Plea of *Chiozzola* for the *Venetian Sovereignty* of the *Adriatick Sea*, at the end of *Mr. Selden*.

IV. And

IV. And as the Sea is capable of Protection and Government, so is the same no less than the Land subject to be divided amongst Men, and appropriated to Cities and Potentates, which long since was ordained of God as a thing most natural: whence it was that Aristotle said, That unto Maritime Cities the Sea is the Territory, because from thence they take their sustenance and defence; a thing which cannot be, unless part of it might be appropriated in the like manner as the Land is, which is divided betwixt Cities and Governments, not by equal Parts, or according to their Greatness, but according as they are able to rule, govern, and defend them: Berne is not the greatest City of Switzerland; yet she hath as large a Territory as all the rest of the Twelve Cantons put together: The Cities of Noremberg and Genoa are very rich and great, yet their Territories hardly exceed their Walls: and Venice the Mistress and Queen of the Mediterranean, was known for many Years to be without any manner of Possession on the firm Land.

V. Again on the Sea, certain Cities of great force have possessed large quantities thereof; others of little force have been contented with the next Waters.

Neither are there wanting Examples of such, as notwithstanding they are Maritime, yet having fertile Lands lying on the back of them, have been contented therewith without ever attempting to gain any Sea-Dominion; others who being awed by their more mighty Neighbours, have been constrained to forbear any such attempt; for which two causes a City or Republick, though it be Maritime, yet it may remain without any possession of the Sea. God hath instituted Principalities for the maintenance of Justice to the Benefit of Mankind; which is necessary to be executed as well by Sea as by Land: S. Paul saith, that for this cause there were due to Princes, Customs and Contributions.

The substance of what was alledged by the Hanſatique Towns, at the Venetians asserting of the Sovereignty of the Adriatick, *Inter res communes, ut ipse Imperator numerat mare, & ideo nemo in mari piscari, aut navigare prohibetur, & adversus inhi- bentem compe- rit actio injuri-*

arum, l. 10. si quis in mare, l. injuriarum, sect. ult. de injuriis. Sin littora quoque communia sunt l. 2. re divirs. Quia accessorium sunt maris, & accessorium sequitur naturam Principalis, l. 2. de peculio. legat. c. accessorium de reg. jur. in 6. Ad littus maris igitur accedere quivis potest, non piscandi tantum gratia, sed etiam edificandi & occupandi causa. quod in litt. de acquirrer. Dom. l. in litt. ff. ne quid in loc. pub. Jo. Angelius F. C. de repub. Hanſiat. par. 6. fol. 85. Edit. Francof. An. Dom. 1641. But these arguments were easily answered by the Venetian Lawyers; Quemadmodum communio littorum re- strin-

*fringitur ad populum, à quo occupata sunt, lib. 3. sect. littora. D. de quid in loc. pub. 14
etiam communitio maris : adeo ut per mare à nemine occupatum navigatio sit omnino libera :
per mare autem occupatum ab aliquo Principe ii liberam habeant navigationem qui sunt illi
Principi subiecti ; alii verò eatenus, quatenus idem Princeps permittit. Julius Pacius de
Dom. maris Adriatici.*

It would be a great absurdity to praise the well Govern-
ment and defence of the Land, and to condemn that of
the Sea ; nor doth it follow, because of the vastness of the
Sea, that it is not possible to be governed and protected ;
but that proceeds from a defect in Mankind ; for Desarts,
though part of Kingdoms, are impossible to be governed
and protected, witness the many Desarts in *Africk*, and
the immense vastities of the *New World*.

VI. As it is a gift of God, that a *Land* by the Laws and
publick Power be ruled, protected, and governed : so the
same happens to the *Sea* ; and those † are deceived by a
gross equivocation, who averr that the *Land*, by reason of
its stability, ought to be subjected, but not the *Sea*, for
being an unconstant *Element*, no more than *Air* ; foras-
much as they intend by the *Sea* and the *Air* all the parts
of the fluid *Elements*, it is a most certain thing, that they
cannot be brought under Subjection and Government, be-
cause whilst a Man serves himself with any one part of
them, the other escapes out of his power ; but this chan-
ceth also to *Rivers*, which cannot be detained : but when
one is said to rule over a *Sea* or *River*, it is understood not
of the *Element*, but of the *Site* where they are placed : the
Waters of the *Adriatick* and *Brittish Seas* continually runs
out thereof, and yet is the same *Sea*, as the *Tyber*, *Pot*,
Rhyne, *Thames*, or *Severn*, are the same *Rivers* they were
a Thousand Years since ; and this is that that is subject
to Princes by way of Protection and Government.

Again, it would seem ridiculous if any Man would as-
sert that the *Sea* ought to be left without Protection, so
that any one might do therein well or ill, robbing, spoil-
ling, and making it unnavigable, or whatsoever should
seem fitting in their Eyes ; from all which it is apparent,
that the *Sea* ought to be governed by those to whom it most
properly appertains by the Divine Disposition.

* Qui omnia
fere Calliserant
incognita, neque
enim temere

VII. When * *Julius Caesar* first undertook the Invasion
of this *Isle*, he summoned the neighbouring *Gauls* to in-
form him of the *Shores*, *Ports*, *Havens*, and other things
convenient

† Grotius mare
liberum. Com-
munitio parit dis-
cordiam : quod
communiter pos-
sidentur, vitio
naturalis negli-
gitur : Habet
communitio re-
rum gerenda-
rum, difficulta-
tem Leg. pater.
S. dulcissime.
Leg. 2.

convenient that might accelerate his intended Conquest, but from them nothing could be had, they answering, All Commerce and Traffick, and visiting their Ports, was interdicted to all Nations before licence had; nor could any but Merchants visit the same, and then had they places assigned them whither they should come; nor was this Dominion that the Britains then used, commanded without a Naval Force; the sight of which when Cæsar saw, he preferred them before those of the Romans: For upon that occasion it was that Cæsar, having seen those Auxiliary Squadrons, which the Britains sent the Gauls in their expeditions against the Romans, took occasion to find out that Warlike People, whose bare Auxiliary Aid shook the Flower of the Roman Squadrons.

præter mercatores adit ad illos quisquam, neque eis ipsis quidquam præter oram maritimam atque eas regiones quæ sunt contra Galliam notum est. Com. Gall. Bell. lib. 4. fol. 72 m. 8. † Gauls Town being then, as is conceived, one of the common pla-

ces of Mart or Commerce for the Gauls. *Quod omnibus fere Galli hostibus nostris inde ministrata auxilia intelligebat.*

And when the Romans became Conquerors of this Isle, the same Right or Dominion was during all their time, supported and maintained when they sailed round their new achieved Conquests in the time of Domitian, Agricola, giving terror to all the neighbouring Nations. *Tacit. in vita Agricol.*

But when that Mighty Empire became subject to Fate, and this Nation by the continual supply of Men, which went out of the Kingdom to fill up the Contingences of the Roman Legions, became at last so enfeebled as to render us a Prey to the Saxons; which Empire having settled Peace with their Danish Neighbours, and quieted their own home-bred Quarrels; and having reduced the several petty Kingdoms of their Heptarchy under one Diadem, they forgot not to assume their ancient Right and Dominion of the Seas; as did the most Noble Edgar †, who kept not less a Number than 400 Sail of Ships to vindicate and ascertain his Dominion, giving Protection to the peaceable, and punishment to the offenders: nor did his Successors Ethelred, Canutus, Edmond, and others that followed of the Danish Race, any ways wave, relinquish or lose that Royalty, but obsequiously maintained the same down to the Conquerour, and from him since for upwards of 1200 years in a quiet and peaceable Possession.

† Altitonantia Dei largiflua elementa qui est Rex Regum; Ego Edgarus Anglorum Basileus, omniumque rerum, Insularum Oceanique Britanniam circumja-

To

cent, cunctarumque Nationum que infra eam includuntur, Imperator & Dominus. Et Chart. fundam. Eccles. Wigor. Sir John Boroughs fol. 21. Idem quoque Edgarus 400. Navis congregavit, ex quibus omni anno post Festum Paschale 100. Navis ad quamlibet Angliæ partem statuit; sic æstate Insulam circumnavigavit; hyeme verò judicium in Provincia exercuit. Ex Ranulph. Cestrenf. fol. 22. F. B.

To mention the ancient *Commissions*, and Exercise of this Sovereign Power; *Safe-conduct*, *Writs of Seizure*, *Arrests*, *Records of Grants*, and *Licences* to pass through the Sea and to fish, *Parliament Rolls* and the like, † would make a Volume; in a word, if *Right of Prescription*, *succession of Inheritance*, *continual Claim*, *matter of Fact*, *consent of History and Confessions*, even from the Mouths and Pens of *adversaries*, be of any moment to the asserting of a Title, his Sacred Majesty may be presumed to have as good a Title to that, as the most absolute Monarch this day on Earth, hath to whatever he can claim or does enjoy. 1 Ro. Ab. 528. pl. 2.

†Sofully proved by Mr. Selden, that it would be impertinent in this Tract to rehearse the authorities he vouches. Vide Jac. Uf. ser. Armach. Epif. Hiberniæ Sylloge p. 121, 163.

VIII. Now the Duty of the Flag is no more but a consecutive acknowledgement that the *Right and Dominion* of the *British Seas*, (not as a bare *Honorary Salute* or *Ceremony*, but as an *absolute Sign* of the *Right and Sovereignty* of those *Seas* where they are obliged to strike Sail) are in him to whose *Flag* they veil, and pay that duty to; and in substance is no more but that the King grants a general Licence for Ships to pass through his Seas, that are his Friends, paying that obeysance and duty, like those services when Lords grant out Estates, reserving a *Rose* or *Pepper Corn*, the value of which is not regarded, but the remembrance and Acknowledgment of their *Benefactor's Right and Dominion*.

The Duty of the *Flag* or *Salutation*, is to be paid not only by *Foreigners*, but also by *natural born Subjects*, and such who refuse to pay the same, may be brought to the *Flag* to answer that Contempt.

That this hath been an *Ancient Custom*, always waiting on that *Sovereignty*, appears by that memorable Record upwards of 400 years since made, where it is declared by King *John* what the *Ancient Custom* was, in these Words; That if a *Lieutenant* in any *Voyage*, being ordained by *Common Council* of the *Kingdom*, do en-

To be paid by Natives as well as Foreigners.

Inter Leg. Marinas sub fine

coun-

counter upon the Sea any Ships or Vessels, laden or *ammi regni Re-*
 unladen, that will not strike and veil their Bonnets at *gis Johannis*
 the Commandment of the Lieutenant of the King, but will *secundi. Enci-*
 fight against them of the Fleet, that if they can be taken, *clod, Le Ord-*
 they be reputed as Enemies, and their Ships, Vessels, *nance al Ha-*
 and Goods taken and forfeited as the Goods of Enemies, *kings.*
 altho' the Masters or Possessors of the same would come
 afterwards, and alledge, that they are the Ships, Ves-
 sels, and Goods of those that are Friends to our Lord
 the King, and that the common People in the same be
 chastised by Imprisonment of their Bodies for their Re-
 bellion, by discretion.

Thus this *Immemorial Custom* was by that prudent Prince
 affirmed, the which hath been always before, and ever
 since (without interruption by all Nations) constantly paid
 to the *Ships of War*, bearing the *Royal Standard*, and other
 of his Majesty's Ships, wearing his Colours and *Ensigns of*
Service; he knowing that undoubted *Maxim of State*, *Leon Lessius de*
That Kingdoms are preserved by reputation, which is as well, *justis & jur.*
their strongest support in Peace, as their chiefest safety in time, *l. 2. c. 2. lib. 19.*
of War; when once they grow despised, they are either subject
 to Foreign Invasions, or Domestic Troubles, the which (if
 possible) that Prince would have prevented, but he lived
 when those Celestial Bodies, which govern the actions of
 Princes, seemed to frown on the most Virtuous and Wise.

IX. And as there is no Nation in the World more ten-
 der and jealous of their Honour than the *English*; so none
 more impatiently tolerate the diminution thereof. Hence
 it was that in all Treaties, before any thing was ascer-
 tained, the *Dominion of the Seas*, and *striking the Top-sail*
 was always first provided for.

In the Year 1653. after the *Dutch* had measured the
 length of their Swords with those of this Nation, and
 being sensible of the odds, had by their four *Am-*
bassadors most humbly besought Peace, this very Duty
 of the *Flag* was demanded by the 15th. *Article*, in these
 words:

That the Ships and Vessels of the said United Pro- *Note, That*
 vinces, as well Men of War as others, be they in single *Cromwel was*
 Ships, or in Fleets, meeting at Sea with any of the Ships *the first that*
 of this State of England, or in their service, and wearing *ever inserted*
 the Flag, shall strike the Flag, and lower their Top- *any such Ar-*
 sail,

title into any sail, until they passed by; and shall likewise submit Treaty: Our themselves to be visited if thereto required, and perform Right and all other respects due to the said Commonwealth of Eng- Dominion over the Bri- land, to whom the Dominion and Sovereignty of the rishSeahaving British Seas belong.

never been
disputed before, but by an immemorial prescription and possession transmitted to us, and supposed as unquestionable by all Princes. *Novem. 15. 1653.*

This was so peremptorily demanded, that without the solemn acknowledgment of the Sovereignty over the British Seas, there was no Peace to be had; that as to the acknowledging of the Sovereignty and the Flag, they were willing to continue the Ancient Custom, but that of Visiting was somewhat hard: 'tis true the latter Clause was by the Usurper waved, for Reasons standing with his private Interest; but the first was (with the addition of these words — in such mannner as the same hath been formerly observed in any times whatsoever) made absolute by the 13th Article between Him and that Republick, in these words: *Item quod Naves & Navigia dictarum Fæderatarum Provinciarum, tam bellica & ad Hostium vim propulsandam instructa, quàm alia, quæ alicui è Navibus bellicis hujus Reipublicæ in maribus Britannicis obviam dederint, vexillum suum è mali vertice detrahent, & supremum velum demittent, eo modo, quo ullis retrò temporibus, sub quocunque anteriori regimine unquam observatum fuit,* and from thence it was transcribed into the 10th Article at Whitehall, and afterwards into the 19th Article at Breda, and from thence into the 6th Article made last at Westminster and that Clause of searching of each others Ships made reciprocal, by the 5th Article made in the Marine Treaty at London; but that extends not to Ships of War, but only to the Ships of Subjects.

X. By the *British Seas* in the Article about the Flag are meant the four Seas, and not the Channel only; for in the 16th Article they did express what was meant by the

*But now by *British Seas**

That the Inhabitants and Subjects of the United Provinces may with their Ships and Vessels furnished as Merchant Men, freely use their Navigation, sail, pass and repass in the Seas of Great Britain and Ireland, and the Isles with-

*Leo ab Aitzma
fol. 847.*

Sep. 14. 1662.

*Dec 18. 1674.
S. V.*

the last treaty at Westminster the dominion is ascertained from Cape Fi-

within the same, commonly called the British Seas, with out any wrong or injury to be offered them by the Ships or People of this Commonwealth; but on the contrary shall be treated with all love and friendly offices, and may likewise with their Men of War-----not exceeding such a number as shall be agreed upon----sail, pass and repass through the said Seas, to and from the Countries and Ports beyond them; but in case the said States General shall have occasion to pass through the said Seas with a greater number of Men of War, they shall give three Months notice of their intention to the Commonwealth, and obtain their consent for the passing of such a Fleet, or preventing of jealousy and misunderstanding betwixt the Seas by means thereof.

nisterre to the middle Point of the Land of the Land Van Staten in Norway Feb. 9. 1674. Artic. in the Treaty of Nov. 15. 1658.

The first part of this Article doth plainly set out the extent of the *British Seas*, and that it is not the bare *Channel* alone that comprehends the same, but the four *Seas*: and the same is further explained in the Great Case of *Constable's*, * where the *Dominion* of the *Queen* (before the Union) as to the Seas, did extend mid-way between *England* and *Spain*, but entirely between *England* and *France*; the *French* never had any right or claim to the *British Seas*; for in the Wars between *Edward the First* and *Philip the Fair*, (all commerce on both sides being agreed to be free, so that to all Merchants whatsoever there shou'd be *inducie*, which were called *sufferantia Guerra*, and Judges on both sides were appointed to take cognizance of all things done against these *Truces*, and should exercise *Judicium secundum Legem Mercatoriam & formam sufferantiae*) it was contained in the first provision of that League, that they should defend each others Rights against all others; this afterwards occasioned the introducing that Judgment in the same King's time, (before those Judges, chosen by both the said Princes by the Proctors of the Prelates, Nobility, and High Admiral of England, and all the Cities, Towns, and subjects of England, &c. unto which were joined the suffrages of the most Maritime Nations, as *Genoa*, *Catalonia*, *Spain*, *Almain*, *Zealand*, *Holland*, *Friezeland*, *Denmark* and *Norway*, and divers other Subjects of the *Roman Empire*) against *Reginer Grimbold*, then *Admiral* of *France*; for that there being Wars between *Philip King* of *France* and *Guy Earl*

Hill 29 Eliz. B. R. the Queen and Sir John Constable's Case Leonard 3. part. 72.

Selden de Dom. Maris l. 2. c. 14. 27. 28.

Rolls Abridg. 2 part. 174.

Coke 4. Instit. 142.

of *Flanders*, he had taken Merchants upon those Seas, in their Voyage to *Flanders*, and despoiled them of their Goods; whereas the Kings of *England* and their Predecessors (as they all jointly do declare and affirm) without all controversy beyond the memory of Man have had the Supreme Government of the *English Seas*, and the *Islands* thereof.

1 Ro. Ab. 528.
pl. 1.

Præscribendo scilicet Leges, Statuta atq; interdicta armorum, naviumque al. ac Mercatoriis armamentis instructarum, causationes exigendo, tutelam præbendo, ubicunque opus esset, atque alia constituendo quæcunque fuerint necessaria ad pacem, jus & æquitatem conservandam inter omnimodas rates

An universal tam externas quam in Imperio Anglicano comprehensas que per
content of all illud transferint; supremam iisdem item fuisse atque esse tuti-
Nations. lam; merum mixtum Imperium in juredicendo secundum dictas

Leges, Statuta, præscripta & interdicta, aliisque in rebus que ad summum Imperium attinent in locis adjudicatis.

Which memorable Record apparently shews, that
4. Instit. 142. the Kings of *England* have had istud regimen & dominium
Selden cap. 27. exclusive of the King of *France* bordering upon the same
Mare clausum. Seas, and of all other Kings and Princes whatsoever; and
Sir John Bar. it was there adjudged that *Grimbald's* Patent was an usur-
roughs fol. 42. pation on the King of *England's* Dominion, and he ad-
judged to make satisfaction, or if he proved unable, then
the King his Master should, and that after satisfaction he
be rendred to punishment.

And as to the second part of the *Articles* of giving notice, it was but an Act of common Prudence; their late unexpected Visit, which they then gave, put the *English* to some surprize; but they facing the *Batavians*, soon made them know that they were as capable of beating them home, as they were then daring in coming out, and were not to be braved out of a *Dominion* and *Right*, which their Ancestors had with so much *Glory* acquired and asserted.

Anno 1635.

XI. By the *Article* of the Offensive and Defensive League between *France* and the *United Provinces*, it was

agreed, That if at any time the *Dutch Fleet* (—which
Lee ab Aitzma were to scour the *French Coasts* in the *Mediterranian* from
Hist. Tract. pa- cis. Belg. pag. 177 dit. Lug- duni Batavor. of the *Dutch* was to strike his *Flag* and lower his *Top-sail* at
quarto 1654. his first approach to the *French Fleet*, and to salute the
Ad-

Admiral of France with Guns, who was to return the said Salute by Guns also, as was usual when the Dutch and English Fleet did meet.

Only in this the Right of the Flag of England differs from that claimed by the French; for if there had been a Failure on the part of the Dutch, of paying that respect to the French, the same would have amounted to no more but a breach of the League: but the not striking to the King of England's Flag, is open Rebellion; and the Article does so signify, for it is there mentioned as a Right and Sovereignty, not a bare Dominion only, like that of Jerusalem to the King of Spain. 'Tis very true, the refusing of it is an absolute annulling of the Treaty; for though in the League with England it is mentioned, yet there is nothing of any concession granted by the same, but only recognized there as a Fundamental of the Crown and Dignity of the Kings of England; nor was the same ever so much as mentioned in any former Treaty before O. C's. time, as we have already mentioned, but it was always a Clause in the Instructions of the Admiral and the Commanders under him, that in case they met with any Ships whatsoever on the British Seas that refused to strike Sail at the Command of the King's Admiral or his Lieutenants, that then they should compute them as Enemies (without expecting any declared War) and destroy them and their Ships, or otherwise seize and confiscate their Ships and Goods; and these Instructions amongst others continue to this day. These are given by the Venetians to their Captains in reference to the Adriatick Sea, and by several other Princes.

XII. The Duty of the Flag that hath been so constantly paid to our Ancestors is of such advantage to the continuing the Renown of this Nation, that it serveth to impart new Reverence in Foreigners that render it, and adds new Courage to those of our Seamen that exact it: and since we know how much it imports a State that it be revered abroad, and that Reputation is the principal Support of any Government, it equally influenceth the Subjects at home and Foreign Allies Abroad. And as there is no Nation in the World more tender of their Honour than the English, so none more impatiently tolerate the diminution thereof. With what resentments would not only the

more Generous and Noble, but even the Popular and vulgar Seamen detest this or any succeeding Age, should they remit or lose that Regality, those Acknowledgments which their Predecessors with so much Glory asserted, and the Neglect whereof was always punished as open Rebellion; the indignity of such an Action being sufficient to enflame the whole Kingdom. The consideration of which, besides his Sacred Majesty's own Royal Inclination to the same, and his evident testimonies never to abandon a Ceremony of so high a concernment; witness the exposing the one half of his own heart his Royal Highness, in the asserting the same, with such Fleets and in such Battels, that no Age or time can shew a Memorial of the like; are causes sufficient to create in us new flames of Love to those Royal Patriots and Defenders of our Rights. Private Persons move in another Sphere, and act by other Rules than

It is no policy Sovereign Powers; the regard of Credit with them may to attempt the oftentimes yield to those of Utility or other motives; the change of old Publick receives little injury thereby, nor is their Wisdom Customs and questioned for such punctilio's, if they relinquish them for Usages, even other Emoluments or peace sake; but Sovereigns cannot errors and abuses are upon such an account legally Honoured and Indignities; they have a Property, a direct Right in the former*: Sovereigns cannot alienate or suffer their Honours to be impaired, because it is not really theirs, it appertains to the Nation universally, and therefore are all effectually injured by such Transactions, either because the indignity really extends to them, or because the Government and Authority is thereupon weakened and prejudiced, which is the greatest of Civil detriments that can befall a People, though ordinarily they are not aware thereof.

*omnibus rebus. vetustas ipsa plurimum habet dignitatis: ita ut Massalienses quorum præstantissima creditur fuisse Res publica, laudentur ænomine quod gladio ad puniendos fontes usi sint eodem à condita Urbe, quo indicarent in minimis quoque rebus antiquæ consuetudinis momenta servanda. Proxime enim ad Deum accedit Antiquitas, ætatis quædam imago. Grot. de Antiq. Reipub. Batav. in Præfat. * Vide The Earl of Shaftsbury's Speech to the Parliament 1672. Ceteris mortalibus in eo stare consilia, quæ sibi conducere putent: Principum diversam esse sortem, quibus præcipua rerum ad summam dirigenda. Tacit. Annal. lib. 4. Si fama tua videtur necessaria, rectam muneris tui administrationem non potest condonare. Lessius de Inst. l. 2. c. 11. dub. 24. §. 26.*

As Prudence doth thus distinguish betwixt the Demerit of Private and Publick Persons, so doth Charity it self

or though the Gospel precepts do oblige particular Persons to bear Injuries and Contumelies with patience, and to surrender even the Coat as well as the Cloak; yet is not his so to be construed, as if even private Christians were to yield up their Civil Rights to every insolent one that would inroach upon, and usurp them, or that they were to deprive themselves of those Reparations, which the Law and Government affords them; neither is it so to be understood as if the Civil Magistrate in Christendom might not secure himself of that Obedience and Reverence, which is due unto Dignity, but bear the Sword in vain.

XIII. This being the value which this Nation did always place upon the Right of the Flag, the which they never did regard only as a Civility and Respect, but as a principal testimony of the unquestionable Right of this Nation to Dominion and Superiority of the adjacent Seas, acknowledged generally by all the Neighbour States and Princes of Europe, and must be paid and acknowledged by Princes in the World, that shall be or pass on the same. The Effects of this Dominion Universal or Sovereignty which accrue to a Prince are these:

I. Not only the Regality of the fishing for Pearl, Coral, Amber, &c. but likewise the Advantage of all Fish Royal, as Whales, Sturgeon, &c. and not only those, but also the direction and disposal of all other Fish according as they shall seem to deserve the regards of the Publick, as in Spain, Portugal, &c. is used.

Joan Palatius
de Dom. Maris
lib. 1. c. 11.
Sir Henry Con-
stable's Case
Coke 5. part.
fol. 107.

II. The prescribing of Laws and Rules for Navigation, not only to his own Subjects, but unto other Strangers, whether they be Princes of equal strength and dignity with himself or any way inferior. Thus the Romans did confine the Carthaginians to equip out no Fleets, and forbade Antiochus to build any more than twelve Ships of War: and if Tradition informs me right, Queen Elizabeth prohibited the then French King to build any other or more Ships of War than what they then had, without her leave first obtained. The Athenians prohibited all Masters of Ships of War to come within their Seas, and prohibited the Lacedaemonians with what manner of Vessels they should sail. All Histories are full of such Precedents which Princes have Enacted either upon Agreements entered upon the Conquered, or Capitulations betwixt

Grotius de Jure
Bell. l. 2. c. 3.
S. 15.

them and others their equals or inferiors for mutual conveniences.

*Joan Palatius
ubi supra.*

*Julius Paucius
de Dom. Maris
Adriatici.*

13 H.3 fol. 14.
Coke 5. part.
fol. 63. Case
Chamberlain
of London.

3. The Power of imposing Customs, Gabels, and Taxes upon those that navigate in their Seas, or otherwise fish therein, which they do upon several rightful Claims, as protecting them from Pirates, and all other Acts of Hostilities, or assisting them with Lights and Sea marks, for which advantages common Equity obligeth those that reap benefit thereby, to repay it with some acknowledgment, which ought to be proportioned according to the favour received, and the Expence which the Prince is at to continue it unto them.

4. As it is incumbent on a Prince duly to execute Justice in his Kingdoms by Land, so the Sea being his Territory, it is requisite and a necessary effect of his Dominion, that he cause Justice to be administred in case of Maritime Delinquences.

5. That in case any Ships navigate in those Seas, they shall salute his floating Castles, the Ships of War, by *lowering the Top-sail, striking the Flag* (those are the most usual courses) in like manner as they do his Forts upon Land; by which sort of Submissions they are put in remembrance, that they are come into a Territory where in they are to own a Sovereign Power and Jurisdiction, and receive Protection from it.

These are the proper Effects of a real and absolute Sovereignty over the Seas, which how they are possessed by the *Venetians*, this ensuing Account will declare.

The Gulph of *Venice* is nothing else but a large Bay or Inlet of the Sea, which entring in betwixt two Lands, and severing them for many Miles continuance, in the end receives a stop or interruption of further passage by an opposite Shore, which joins both the opposite Shores together: It is called the Gulph of *Venice*, from the City of *Venice*, situate upon certain broken Islands near unto the bottom thereof: it is also called the *Adriatick* Sea, from the Ancient City *Adria*, not lying far distant from the former; from the Entrance thereof unto the Bottom it contains about six hundred *Italian* Miles, where it is broadest it is an hundred and sixty Miles over, in others but eighty, and in most an hundred. The South-West shore is bounded with the Provinces of *Puglia* and *Abruz-*

zo in the Kingdom of Naples; the Marquisate of *Ancona* and *Romagnia* in the Pope's State; and the Marquisate of *Trevifana* in the *Venetian* State: The North part of it, or Bottom, hath *Friuli* for its bounds; the North-East is limited by *Istria*, *Dalmatia*, *Albania*, and *Epirus*: whereof *Istria* doth not so entirely belong to the *Venetians*, but that the Emperor as Arch-Duke of *Gratz*, doth possess divers Maritime Towns therein; in *Dalmatia*, saving *Zara*, *Spalato*, and *Cataro*, they have nothing of importance, the rest belonging to *Ragusa* and the *Turks*: in *Albania* and *Epirus* they possess nothing at all, it being entirely the *Turks*; so that he who shall examine the circuit of the Sea, which must contain about twelve hundred Miles, shall find the Shores of the *Venetian* Signory not to take up two hundred of them, omitting some scattered Towns and dispersed Islands lying on the *Turkish* side of the *Adriatick* Shore.

'Tis very true of late by the great Conduct and good Fortune of the Generals *Morofini* and *Coringmarke*, they have now got *Alba Regalis* and almost the principal parts of the *Morea*.

For the securing hereof from the depredations of Pirates, and the Pretences of divers potent Princes, as the Pope, Emperor, King of *Spain*, and the Great *Turk*, who each of them have large Territories lying thereupon; also to cause all Ships which Navigate the same to go to *Venice*, and there to pay Custom and other Duties, the Republick maintains continually in action a great number of Ships, Gallies, and Galliot; whereto also they add more, as there may be occasion; whereof some lie about the bottom of the Gulph in *Istria*, others about the Islands of *Dalmatia* to clear those parts of Pirates, who have much infested those Seas and others; and those of most force have their station in the Island of *Corfu* and *Standia*; in the first of which commonly resides the Captain of the Gulph, whose Office is to secure the Navigation of the Gulph, not only from the *Corsairs*, but to provide, that neither the Gallies or Ships of the Pope or King of *Spain*, nor Great *Turk* do so much as enter the same, without permission of the Signiory, and upon such conditions as best please them, which they are so careful to effect, that in the Year 1638 the *Turkish* Fleet entring the Gulph without Licence, was assailed by the *Venetian* General, who sunk divers of their Vessels, and compelling the rest to fly into *Valona*, he held them there besieged, although the same City and Port whereon it stands, be under the Jurisdiction of the *Grand Signior*, and notwithstanding

Baptista Nani
his History
of *Venice*, lib.
II. fol. 446,
447, 448.

that a great and dangerous War was likely to ensue thereupon betwixt the *Grand Signior* and the *Republick*, because the *Venetian* General being not content to have chased them into their own Ports, did moreover than that sink their Vessels, and landing his Men, slew divers of their Mariners, who had escaped his fury at Sea; yet after that a very honourable Peace was concluded again betwixt them, wherein amongst other things it was agreed, That it should be lawful for the *Venetians*, as often as any *Turkish* Vessels did *without their licence enter the Gulph*, to seize upon them by force, if they would not otherwise obey, and that it should likewise be lawful for them so to do within any Haven, or under any Fort of the *Grand Signior's* bordering on any part of the *Venetian Gulph*: So jealous hath this *Republick* been in all times to permit any to sail the *Gulph*, that in the Year 1630. (as *Palatius* relates) that *Mary*, Sister to the King of Spain, being espoused to the Emperor's Son *Ferdinand* King of Hungary, the *Spaniards* designed to transport her from *Naples* in a Fleet of their own, the *Venetians* suspected that they had an intention hereby to intrench upon, and privily to undermine, by this specious Precedent, that Dominion of the Sea which the Signiory had continued inviolate time out of mind; and that they took this Opportunity when *Venice* was involved with a War abroad, and infested with the Plague at home, and therefore not in a condition to oppose their Progress. The *Spanish* Ambassador acquainted the State, that his Master's Fleet was to convey the Queen of Hungary, being his Sister, from *Naples* to *Triesti*: The Duke replied, That her Majesty should not pass but in the Gallies of the Republick; the *Spaniard* replied thereat, pretending that they were infected with the Plague: The Senate being consulted, came to this Resolution, That the Sister of his Catholick Majesty should not be transported to *Triesti* any other way, than by embarking in the *Venetian* Gallies, according to the usual manner of the Gulph; and that if the Ambassador would acquiesce therein, her Majesty should be attended and used with all that respect and deference which became her Quality: but if she proceeded any other way, the Republick would by force assert her proper Rights, and attack the *Spanish* Navy as if they were Enemies, and in Hostile manner invade them.

Where-

*De Domin. Mar.
ris. l. 2. c. 6.*

Whereupon the *Spaniard* was compelled to desire the favour of them to transport the Queen in their Gallies, which *Antonio Pisano* did perform with much State and Ceremony; and the Courtesie was acknowledged by the Courts of the Emperor and King of Spain.

XIV. The *Maritime Dominion* by the *Laws of England* Selden Mare Claus. l. 2. c. 24. Fitzherb. prolation, tit. 46. Seld. ibid. were always accounted the *Four Seas*; such as are born thereon are not *Aliens*, and to be within them is to be within the *Legeance* of the King and Realm of England.

The Records in the days of *Edward the Third* and *Henry the Fifth* proclaim it, that those Kings and their Progenitors had ever been *Lords of the Sea*; and amongst those many great Instances of proving the *Sovereignty* of the same, is that famous Record of *Edward the First* and *Philip the Fair of France*, in which were the *Procurators* of most Nations bordering upon the Sea throughout Europe, as the *Genoefes*, *Catalonians*, *Almaines*, *Zelanders*, *Hollanders*, *Frieze-landers*, *Danes*, and *Norwygians*, besides others under the Dominion of the *Roman German Empire*, where all jointly declare, That the Kings of England, by right of the said Kingdom from time to time, whereof there is no memorial to the contrary, have been in peaceable possession of the *Sovereign Lordship* of the Seas of England, and of the Isles within the same, with power of making and establishing *Laws*, *Statutes*, and *Prohibitions* of Arms, and of Ships otherwile furnished than Merchant Men use to be, and of taking surety, and affording safe-guard in all cases where need shall require, and of ordering all things necessary for the maintaining of Peace, Right and Equity among all manner of People, as well of other Dominions, as their own passing through the said Seas, and the *Sovereign Guard* thereof. 1 Ro. Ab. 528: pl. 2. Vide part of the Record.

By which it plainly appears, That the Kings of England had then been in peaceable possession of the said Dominion by immemorial Prescription, that the Sovereignty belongeth unto them, not because they were *Domini utriusque ripæ*, when they had both England and Normandy, and were Lords of both Shores; (for *Edward the First* at that time had not Normandy) but that it is inseparably appendant and annexed to the Kingdom of England, our Kings being *Superiour Lords of the said Seas*, by reason (as the very Record mentions) of the said King. And the Case is 27 Eliz. in B. R. Sir John Constable's, Leonard 3 pars. 72.

The reason of the opinion there is mistaken; for the right unto the Sea ariseth not from the possession of the shores; for the Sea and Land make distinct Territories, and by the laws of England the

Land is called the Realm, but the Sea the Dominion; and as the loss of one Province doth not infer that the Prince must resign up the rest; so the loss of the Land Territory doth not by Concomitancy argue the loss of the adjacent Seas. It is no more necessary that every Sea-Town should command an hundred Miles at Sea, than that each City should command an hundred Miles by Land. *Julius Pausan de Domin. Maris Adriatici.*

Kingdom: and since that the Sovereignty of the Sea did always appertain unto the *English King*, not in any other Right than that of the Kingdom of England; no Prince or Republick ought or can doubt the Title by which our present Claim is deduced; 'tis in right of *Britannia*, that the same is challenged, 'twas in that right the *Romans* held it: the claim justified *Edward the Third* and his *Rose Noble*, though there are other reasons regarding the *Lancastrian Line*, which yield a Colour for the use of *Port-cullis* in the *Royal Banners* of England; yet as in reference to the *Maritime Dominion*, *Henry the Eighth* did

Anno Domini
1600.

embellish his *Navy Royal* therewith, and *Queen Elizabeth* stamped it upon those *Dollars* which she designed for the *East India Trade*, signifying her power of shutting up the Seas, if she thought fit (as by a *Port-cullis*) with the *Navy Royal*; this *Dominion* of the *British Seas* did Authenticate the Proclamation of King *James*, ordaining the *Flemish* at *London* and *Edinburgh* to take licence to fish: this justified the like Proclamation by the late *Royal Martyr King Charles*, and warranted by the *Earl of Northumberland* in his *Naval Expedition*.

Anno Domini
1609.

Anno Domini
1636.

Wilk. Falbeck's
Pand. Et of the
Law of Nations
cap. 4.
The King against
Sir John Byron.
Bridgman fol. 23,
24, 25.

That *Prescription* is valid against the *Claims* of *Sovereign Princes* cannot be denied, by any who regard the *Holy Scripture*, *Reason*, the practice and tranquillity of the *World*: and that true it is, the modern *Dutch* have pretended, if not dared, to challenge the *Freedom* to Fish in the *British Seas*, by *Prescription*; but it is likewise as true that *Prescription* depends not upon the *Corporeal* but the *Civil* possession, and that is retained, if claim be but made so often as to barr the *Prescription*, the which hath been always made evident; first by frequent *Medals*, next by punishing those that refused it as *Rebels*, by guarding of it; and lastly by giving *Laws* time out of *Mind* on it, which evidently proves that the *Civil* possession is not relin-

linquished; and our Kings constantly claiming the Dominion of the same, none else pretending, all Nations acknowledging it to be in them, and the same never questioned, till those modern *Dutch* (of yesterday) arose.

XV. The Importance of the Dominion of the Sea unto this Nation, is very great, for on that alone depends our Security, our Wealth, our Glory; from hence it is that *England* hath a Right to all those Advantages and Emoluments, which the *Venetian* Republick draws from the *Adriatick Sea*, where the Ships of the *Grand Signior*, of the *Emperor*, *King of Spain*, and *Pope* pay Customs, to maintain those *Fleets*, which give Laws to them within the *Gulph*; 'tis hereby that the *English* can shut up or open these Seas for Ships or Fleets to pass or repass them; whereto *Queen Elizabeth* had so special a regard, that when the *King of Denmark* and the *Hansatick Towns* solicited her Majesty to permit them free passage, they transporting Corn into *Spain*, she refused them; and when a *Protestant Fleet of Hamburgers* and others, had presumed to do so, notwithstanding her Prohibition, she caused her *Navy Royal* to seize, take, burn, and spoil them, when they were passed her Maritime Territory, within sight of *Lisbon*; yielding this reason for her justification, That they not only relieved her Enemy with Provisions, but had presumptuously made use of her Seas, without obtaining her Royal Permission for so doing: 'tis from hence that the Crown of *England* can justly demand an account of any Ship or Ships occurring in those Seas, what's their Business, and what their Intentions are; and prohibit any Prince or Republick to enter there with potent Fleets, without preacquainting his Majesty, and obtaining his Royal Permission; without which Dominion and Sovereignty *England* can never live secure on shore, it being easie for any Foreign Fleets to amuse us with specious pretences, and in their passage to invade and surprise us. Thus while the *Turk* pretended to sail for *Malta*, he occasionally possessed himself of *Canea*, in the Isle of *Candia*, and after having tasted the sweet of that place, never forsook it, till he made himself Master of the whole. Many such Precedents do occur in History: And in fear of such Suprizal, the *Athenians* (being Lords at Sea) did exclude the *Persian* Monarchs from

Vide postea in
Cap. of Cu-
stoms.
June 30. Anno
1598.

Selden lib. 1.
cap. 11.

send-

*Albert Gentil.
Hisp. Advocat.
l. 1. c. 14. Vide
Mr. Secretary
Cook's Letter
to Sir Will.
Moswel April
16. 1635.*

* The fight
of the Dutch
with the Spa-
nish Fleet in
the Downes,
1639.
*Scilicet
hoc factum
Hollandorum
est contra justitiam omnem pro
certo, & contra
reverentiam
qua partibus
& territoriis
debetur alienis.
Alb. Gent.
Hisp. Advoca-
cat. lib. 1. cap.
14.*

*Anno Domini
1552.*

sending any Ships of War into any part of the *Agæan* Sea, *Rhodian*, *Carpathian*, and *Lydian* Seas, and that which tends to the *West*, towards *Athens*; the like Cauti-
on was used by the *Romans* against *Antiochus* and the *Carthaginians*; and the *Turk* prohibits all Nations, saving his Vassals, to enter the *Black Sea* or *Pontus Euxinus*, and also the *Red Sea*; and that 'tis by virtue and force of this Right that the *British Nation* can drive on their own Commerce, navigate themselves, and permit others securely to trade with them. 'Tis true that the *Dutch* have presumed some years since, to violate the security of the *British Seas*, by the attacking the Allies of *England*, not only within the *British Seas*, but in her Harbours, attempting to pursue a *French Vessel* up almost to *London*, and have more than once * attacked the *Spanish Fleets* in her Roads, under the protection of her Castles, and that against the *Laws of Nations*, and the *Peace of Ports*, in which for the time they seemed to cloud the *Honour of the Nation*, but satisfaction for Indignities of that nature, though slow, yet are sure, and should such as those have been longer tolerated beloved *Britannia* must become a prostitute, by a Confederation of those *States*, or take *Pass-ports* for her Commerce; but the *Royal Martyr's* Goodness was no longer to be trod on, his Heart and his Cause were good, and though those unhappy Times (which were crooked to whatsoever seemed straight) did hinder the accomplishments of his entire intention for *Satisfaction*; yet those whom the just *God of Heaven* was pleased for a time to permit as a punishment to this Nation to rule, did not want in the fulfilling; for so soon as he was pleased to stay the fury of the *Intestine Sword*, their Hearts took fire from those flames that had formerly been kindled in that *Royal Breast*, and having prepared a Fleet, in order to the treating as Soldiers with Swords in their hands, they were in the like manner assaulted in their Territories in the *Downs* (but the *Dutch* found then what it was (though two for one) to assault a *British Lyon* at the mouth of his *Den*) intending, if possible, to have destroyed the *English Power*, but were frustrated in their design, being severely beaten home to their own doors; and afterwards those that then had got the *English Sword* in their hands, begun to consider that the *Victory* must
be

be pursued as a season fit to assert their *Ancient Right* and *Sovereignty* of the Sea, and then those People thinking that the odds before was not enough to destroy the *British Fleet*, they equipt out a Fleet Greater and far more numerous than the *English*, under the *Admirals*, *Van Trump*, *De Wit*, the two *Evertsons* and *Ruyter*; but they suffered the same Fate as their former, about some thirty four of their *Ships* on the Coast of *Flanders*, burnt and taken, and the rest chased home to their Ports; and not long after followed the total defeat of their *Naval Forces*, accompanied with the death of *Van Trump* by the *English*, under the *Admirals*, *Blake* and *Monk*, who had sunk and fired about thirty more of their *Ships of War* (no quarter being given till the end of the Battel) six *Captains* and about a thousand *Men* were taken Prisoners, and about six thousand slain. Of their *Presumptions* since (amongst other things) in denying the Duty of the *Flag*, and what punishment and chek they have had for the same, to what condition they have been reduced, and made to acknowledge that *Dominion and Superiority* to that Crown (under which their *Ancestors* humbly * besought the acceptance of the *Sovereignty* of the *Netherlands*, might be annexed and protected) is now fresh in our memories; so high and of so great Importance is this *Dominion and Sovereignty* signified by the *Duty of the Flag in the British circumjacent Seas*.

June 2, and 3.

About the 8 of Aug. 1653.

* Offered to Queen Eliz.
Cette cy entre autres merite bien une consideration speciale, Que la conjunction desdits

Pays de Hollande, Zelande, Frize, & des Villes de l'Escluz, & Ostende en Flanders, avec les Royaumes de vostre Majesté, emporte & soit l' Empire de la Grande Mer Oceanne; & par consequent une assurance & Felicité perpetuelle pour les Subjets de vostre Serenissime Majesté. John Stow's Supplement to Hollingshed, An Dom. 1585. Vide Sir Walter Raleigh, lib. 5. cap. 2. §. 2, & 3.

C H A P. VI.

Of the Right of Pressing or Seizing of Ships
or Mariners for Service Publick.

- | | |
|---|--|
| <p>I. That such Right is excepted in the Law of Dominion.</p> <p>II. Whether the Ships of Nations who are in War at the same time, may be pressed, the danger being equal.</p> <p>III. Whether this Right extends to Ships to fight, and no more, or gives a power to trade.</p> <p>IV. By the Laws of England the King may seize</p> <p>V. The reason why such a power was vested in the Admiral.</p> <p>VI. That such a Right of compelling Men to serve in Naval Expeditions may be.</p> | <p>VII. Objections legal refuted.</p> <p>VIII. Of the ancient punishment of such deserters of the King's service.</p> <p>IX. Concerning the several Statutes this day in force touching Mariners and Soldiers.</p> <p>X. Whether it be lawful for a private Man to execute Justice in such as fly and desert the service.</p> <p>XI. Where a general Commission is given to Men to execute Justice.</p> <p>XII. Several Cases touching the Admiralty and their Jurisdiction. Ships or Boats found at Sea, Royal Fish and Deodands belong to the Admiralty.</p> |
|---|--|

I. **T**HE *Civil Law*, though it can command nothing which the *Law of Nature* forbids, nor forbid what it commands; nevertheless it may circumscribe natural Liberty, and prohibit what was naturally lawful: and also by its force *antevert* that very Dominion, which is naturally to be acquired. Hence it is that Princes, by the Law of Nations, may acquire a Right of use, of things that do belong to private Persons; for property hath not (as hath been said) swallowed up all that *Right*, which rose from the common state of things; because as all Laws are to be construed as near as possible to the intention of the Makers, so we must consider what was the mind of those that first introduced singular Dominions: now the Rule to construe that, must be as near as possible to natural equity, and that in extreme necessity that old right of using things should revive as if the things had remained common, the same standing with the Interest of all humane Constitutions; and therefore in the Law of Dominion

Enra, aut mal
aut necessario
facinore retin-
sa. Liv. lib.
24.

nion extreme Necessity seems excepted. Hence it is that the Vessels and Ships of what nature and Nation soever † that shall be found riding in the Ports or Havens of any Prince or State, may be seized on, and imployed upon any service of that Sovereign that shall seize the same, being but a harmless utility, not divesting the Owners of their interest or Property. † F. de Navibus non excus. C. l. 11. tit. 3. and Pekins on the same Law.

II. If a Ship of the King of *Denmark* be in the Port of *London*, and the *Swede* is in War with that Prince; and it happens at that time the King of *Britain* is in War with the *Spaniard*; now the Possessor is here pressed with an equal necessity, and by the same argument is rather obliged to the defence of his own Country than another, whether by the Law of Nations the Ship ought to be detained, hath been doubted; most certain they may: who would not pluck a shipwrackt Man from his plank, or a wounded man from his Horse, rather than suffer himself to perish? to flight which is a sin, and to preserve, the highest of wisdom: besides, in the taking of the Vessel the right is not taken from the Owner, but only the use, which when the necessity is over, there is a condition of restoring annexed tacitly to such a seizure. Quidni enim (inquit Cicero) quando sine detrimento suo potest, alteri communicet, in iis quæ sunt accipiens utilia damni non molesta? 1. de Offic. 1.

And doubtless the same Right remains to seize the Ships of War of any Nations, as well as those of private interest, the which may be imployed as occasion shall present: So the *Grecians* seiz'd † on Ships of all Nations that were in Ports, by the advice of *Xenophon*; but in the time provided food and wages to the Mariners. † De Expeditione Cyri.

III. Whether this Right extends so far as to give Princes a power to seize in order to traffick may be some question; certainly if the Traffick be for such Commodities, as Masts, Timber, Tar, Powder, Shot, or other Commodities or Accoutrements of Arms, or Naval Provisions of offence necessary for the defence of the Realm, it may be done (but then it is just, freight * should be paid) for what hurt can it dome to let another have my Boat to pass over the Ford, if he rewards me? and if that be answered, the Owners are at no prejudice, for this is but a harmless utility. 10 Ed. 3. m. 16. 12. * 23 Ed. 1. Rot. 77. in the Exchequer.

IV. By the Laws of *England* there is no question, but the King may seize, and it appears by very many ancient Records, that he might do it, and it was one of the Articles of the Admiralty. 12 E. 3. in the Black-Book of the Admiralty.

P. 26. and 27. cles of Enquiry amongst others. Item, soit enquis de
 6 Joh. m. 11. Pefs, que sont arrestees pour le service du Roy, ou pour
 2 Joh. m. 3. autre raisonnable cause per les Officers du Roy, ou de
 24 Ed. 2. m. 17. l'Admiral, & debysent l'Arrest, & par les quelles avant-
 31 R. 2. m. 13. dites Pefs sont emmenez, & retamer les Mariners qui
 Rott. Franc. sont ordonnez pour le service du Roy; & si retracent, &
 en cas que homme soit endite qui la debuse l'Arrest en la
 Pef arrestee pour le service du Roy, & de ce soit conbier
 par xi. il perdra la Pef si l'na grace du Roy ou du hault
 Admiral, & pour ce quil a este plusieurs fois debatue en
 Angleterre pour les arrestes des Pefs. quant le Roy a-
 mande Sergeants d'Arms, ou autre Ministres pour ar-
 rester Pefs al oeps du Roy, & les Seigneurs des Pefs sont
 venus devant l'Admiral, & alleguent que leurs Pefs
 nestoient mye arrestees, ordonne estoit au temps du Roy
 Richard le Primier a Grimsby per abbis de plusieurs Sei-
 gneurs du Royaume, que quant Pefs seront arrestees
 pour service du Roy, que le Roy escripta par ses Lettres
 Patentes a l'Admiral d'arrester les Pefs plus ou moins
 a la voulonte du Roy; & selon ce quil a besoin, & l'Admiral
 escripva au Roy ou au Chancelier d'Angleterre les noms
 des Pefs ainsi arrestees assemblement avec les noms des
 Seigneurs & Maistres d'icelles, & en tel cas le Seigneur
 de la Pef ne le Maistre ne viendront pas a dire que la
 Pef nestoit mye arrestee ne a ce ne seront oyz, and that
 upon such Arrests broken, the Parties might be punished
 and fined.

*De Offic. Admi- Again, Inquiratur si arrestatus, ad serviendum Regi fre-
 ral. Anglia per git arrestum, hujusmodi transgressor stat in gratia Regia sive
 Roughton, Ar- Admiralli sui utrum voluerint committere Carceribus manci-
 tic. 10. pandum vel finem facere; in hac parte si arrestum hujusmodi
 factum manifestum fuerit cognitum.*

*The Black- If the Admiral by the King's Command arrests any
 Book of the Ships for the King's Service, and he or his Lieutenant re-
 Amiralty, turn and certifie the Arrest or a List of the Ships arrest-
 fol. 28, 29. & ed into Chancery, no Master or Owner of the Ships so
 157, 158. arrested shall be received to plead against the Return,
 15 R. 2. c. 3. pur ceo que l'Admiral & son Lieutenant sont de record.*

*Item, Inquirendum de omnibus Navibus quæ ad servien-
 dum Domino Regi super mari arrestatæ fuerint, & postea
 Domini possessores, sive Magistri dolo & fraude a servitio bu-
 jusmodi se subtraxerunt in deceptionem Domini Regis, qui*

si inde postea indictati fuerint, & convicti super hoc, naves sue Domino Regi forisfactæ per ordinationem Domini Regis Richardi Primi; & si Domini, Possessores, vel Magistri hujusmodi inde coram Domino Rege & Cancellario suo per aliquas allegationes se aut naves hujusmodi excusare voluerint, si Admirallus vel locum tenentes sui per Literas suas Patentes de arresto hujusmodi factæ fidem fecerint pleniorẽ, Domini, Possessores, aut Magistri prædicti nullo modo audiri debeant, seu eis fides quovis modo adhiberi, eo quod Admirallus & locum tenentes sui sunt de recordo.

And if the Ship so arrested break the Arrest, and the Master or Owner thereof be indicted and convicted Cro. Arg. of Hampden's C, called the Shipmony C. fol. 79, to 100. debant l'Admiral by the Oath of twelve men, the Ship shall be confiscate to the King, which power the General maintains in all places where he has power, and the same seems to be provided for in the latter Clause of 15 R. 2

Ca. 3.

VI. By King Ethelred, his Bishops and Nobles in the General Council of Enham, Anno 1009. for the setting out a Fleet Spelmani Com. cil. Tom. fol. 520, 521. every Year, and the punishment of those who hurt or spoiled any Ship, or deserted the Service, especially if the King was present in the Expedition, amongst others it was Enacted, *Si quis Navem in Reipub. Expeditionem designatam vitia verit, damnum integre restituito & Pacem Regis violatam compensato; si verò ita prorsus corruperit, ut deinceps nibili habeatur, plenam luito injuriam & læsam præterea Majestatem.* So Sir Henry Spelman's Version out of the Saxon Copy renders it, but the ancient Copy hath it more largely.

Naves per singulos annos ob patriæ defensionem & munitio- Spelmani fol. 528. expeditio Navalis. nem præparentur, postque Sacrosanctum Pascha cum cunctis tensilibus competentibus simul congregentur; qua igitur etiam gena digni sunt, qui Navium detrimentum in aliquibus percipiunt? notum esse cupimus, quicumque aliquam ex Navibus per quampiam inertiam vel incuriam, vel negligentiam corruperit; & tamen recuperabilis sit; is Navis corruptelam vel fracturam ejusdem per solidam prius recuperet, Regi; deinde, quæ pro ejusdem munitionis fractura sibi met pertinent, rite resolvat.

Most certain it is, that the Kings of England have in all Ages, by their Writs and Patents, commanded not only the Admiral, but the Wardens of the Cinque-Ports and

G

others,

Rot. Scotiæ 10
E. 3. m. 2. to
17. and then
to 34. intus &
dors. to 28.

others, to arrest and provide Ships of War, and other Vessels, and impress and provide Masters of Ships, Seamen, Mariners, and all other necessary Tackle, Arms, and Provisions for Ships, for the defence of the Sea and the Realm against foreign Enemies, or for transporting of Armies paying their Freight (if not bound thereto by tenure) as well as to elect and provide all sorts of Soldiers, Carpenters, and other Officers to be assistants in their several Expeditions.

1 Eliz. cap.
13. Vide Stat.
16. 17. Car. 1.
c. 5.

But Fishermen or Mariners pressed for the Service, are not to be employed as Soldiers, but only as Mariners; unless it be in cases of great necessity, or bound thereunto by Tenure, Custom, or Covenant.

2 & 3 P. &
M. c. 16. S. 8.

And Watermen that shall withdraw themselves in time of pressing, shall suffer a fortnight's Imprisonment, and be prohibited to row on the *Thames*.

Court of Ad-
miralty ere-
cted by Ed. 3.

V. The reason why the *Admirals* had such power given them, was because they being sometimes called *Capitanei*, and *Gubernatores Flotarum*, they had their ordering and governing of the Ships of War, and the raising and fitting up such Ships for the Navies, as they thought fit; other times called *Custodes Maritimarum partium*, their duty being to provide all Naval Provisions, as well to supply the King's Navies occasions, as to gratifie any other of the King's Friends, when distress should constrain them to touch in his Ports, that his Subjects might receive the like retaliation again; they were called *Capitanei Nautarum & Marinellorum*, as in reference to the deciding all differences amongst those in the King's Service, and punishing of such as transgressed; and as the place was great, so the power was large, especially in all things belonging to the *Navy-Royal*; in which they had the Supreme rule and government in all things belonging to it. He sat formerly in the King's House, and there kept his Court, as the *French Admirals* do at this day at the *Marble-Table*, in the King's House at *Paris*.

Vide Sir Henry
Spelmans Gloss.
in tit. Admir.
Lambert Ar-
cheion tit. Ad-
miral fol. 4. 2.

And although there seems no question but the King may press Ships, yet there have been those who seem to doubt, if not to question, whether he may press Men to serve; for my own part I think he may, my Reasons are these: It is lawful for every Man to addict and yield up himself to whom he pleaseth, as appears both out of the

Hebrew

Chap. 6. Of pressing Ships and Mariners.

99

Hebrew Law and Roman Law; why then may not any People, being at their own dispose, give up themselves to their Prince or Sovereign, so as to transcribe the right of commanding their aid and help, as often as need shall require (it is not here inquired what may be presumed in a doubtful case, but what may be done in point of right) most certain such a power may well be done, and that grounded on great Reason; as if the Common wealth should happen to be invaded by such a one as seeks not only the subversion of the Government, but the destruction of the People, and they can find no other way to preserve themselves, but that the supream Power should be vested with such a Prerogative, as to inforce or press the Inhabitants to serve in Arms in the Defence of the same, and the contempt of which to punish; or if they should be oppressed with Want, and that supplies of Provisions can no ways be had, but by compelling another by force to exhibit the common Offices of humanity to a Nation in whose Territories a Famine rages, that the Inhabitants should on such extraordinary Occasions be compelled by force to serve in Arms.

And this Dominion may be obtained several ways, either by a voluntary Resignation to a Conqueror, as they of *Capua* to the *Romans*, *Our Land, the Temples of our Gods, all Divine and Humane things we yield up unto your hands, O ye Conscrip't Fathers*. Again, Freedom may be granted to all by a Conqueror, except Mariners, which should in Cases of necessity be excepted, or that some Prince, who will not suffer any Mariner to go out of his Dominions, without subjecting themselves to such a reasonable command, besides the Majority of Nations on such grounds, may abdicate from a part of them the entire Freedom of that Member.

Nor are there examples of this kind wanting; the *German*s are every one Master of his own House, but are almost on every occasion subject to their *Lords*, especially in their Goods. The *Irish* *Cosherers*, which were reprehensions, when the *Chief Lord* and his Retinue came to his Tenant's House, they fed upon his Provisions till they were spent, all being solely at their Devotion. And as to the Sea, the King of *Britain* may at this day restrain Merchants or Mariners to pass out of the Realm, without Li-

Tactur.

Coke 2. Instit. fol. 358.

2. E. 1. Memb. 18. Rott. Pat.

2 E. 1. m. 17.

Rot. fin. 31. E.

1. num. 44.

Ro. Pat. 17.

H. 6. Ro. Cla.

in dorf. Vide

the Case of

Bates, in Lane's Reports, fol. 4.

cence; and the various tenures that are introduced, which is presumed were since the *Conquest*, were no other but the Will of the *Conqueror*; for the right is not measured by the excellency of this or that form, but by the Will.

1 Inst. 71. a.

6. do. 270.

And the Stat. which provides punishment for those Watermen who shall hide themselves, does evidence what the Common Law was as to the right of pressing, which certainly would never punish those whom they could not press.

* 2. Apr. 49

E. 3. in the

Black Book

of the Admiralty

32, 33.

34. Art. and

fol. 62. Art.

16.

VII. And though it hath been conceived by some, that the King cannot press Men to serve in his Wars, giving their Reason, that of old he was to be served either by those that held by tenure, those that covenanted by Indenture to provide Men, or those who contracted with the King's Officers for Wages and entered into Pay, or those that were in Prison for the King's Debts; but that only extended to those Wars that were by Land: not one word in all those Acts, or Muster Rolls, relating in the least to Mariners; and yet what vast Fleets were in those Days? But on the other Hand it hath been always accustomed to press such sort of Men for the Naval Expeditions. The ancient Records that mention such Persons subject to be press'd by Law is that of 29 E. 3. commonly called * *The Inquisition of Queenborough*, wherein it was expressly in charge amongst others, to inquire of those Mariners that were pressed for the King's Service and deserted the same: So likewise by those other Articles translated by *Roughton*, it is in express charge to the *Jury* to present those that being press'd to serve, brake the King's Arrest, in order to their Punishment; and in those days it was esteemed an high offence: and the Oath which the *Jury* then took being impanelled, was this.

This here see my Lord the Admiral, that I Jonathan Nash shall well and truly enquire for our Lord the King, and well and truly at this time then serve at this Court of th' Admiralty, present as moch, as I have acknowledge, or may have by information of any of my Fellows, of all mane Articles or Circumstances that touchen the Court of the Admiralty and Law of the Sea, the which shall be grate to me at this time; and thereupon sworn or charged, and of all other that may renew in my mind, and in shall for nothing lette, that is for to say, for Franchise, Lordship, Kinreden, Allience, Friendship, Love, Hatred,

Patred, Enby, Enemitee, for bred of lost of Goodnee, for non other case that I shall see doe, the King's Counseils, The Black my fellows, mine owne, will and truly hele with out fraude or malengyn, so God me help at the holy dome, and by this Book.

The Black
Book of the
Admiralty
fol. 17.

VIII. And as the enquiry was strict, so was the punishment very great: *Item, qui fugiet à Domino vel socio suo pro timiditate belli vel mortis in conductione Heretochii sui in expeditione navali vel terrestri, perdat omne quod suum est, & suam ipsius vitam, manus mittat Dominus ad terram quam ei antea dederat.*

Lamb. inter
Leg. Edwar. f.
139. 13 Car.
2 cap. 9. Ar.
17.

IX. In the Service of the King two sorts of persons were always capacitated to attend the Navy Royal in their Expeditions, the one a Salt-water Land-Soldier, the other a compleat Mariner or Sailer: It was a doubt, whether such a Soldier, departing from the service, were subject to any other punishment than that of Martial Law, which can at no time be executed in England but when the King's Standard is in the Field; thereupon it was provided, That if any Soldier being no Captain, immediately retained with the King, which shall be in wages and retained, or take any prest to serve the King upon the Sea, or upon the Land beyond the Sea, depart out of the King's service without licence of his Captain, that such departing be taken, deemed, and adjudged Felony. And that all the Justices in every Shire of England, where any such Offenders be taken, have power to enquire of the said offences, and the same to hear and determine as they do and may do of Felony, &c. expressed in the King's Commission to them made, as though the same offences were done in the same Shire; and also that the departing of such Soldiers, and also their Retainers, if it be traversed, be tried in the same Shire where they are for such a Cause arrested and arraigned. The Justices have here a concurrent power to enquire and try, but it does not shut out the Severeign Courts, or hinder, but the King may try them upon a Commission of Oyer and Terminer, or Goal-delivery. It was a doubt conceived by some of the late Judges, if a Man had run from his Colours at Plymouth, and afterwards was taken in Middlesex, and committed to Newgate, whether after a Bill is found in Middlesex, the Justices of Gaol-delivery for Newgate could try him; but it was ruled more than once by the greater

7 H. 7. cap. 1.
8. 2. Cro. Car.
71.
3 H. 8. cap. 5.
S. 2.

number of the Judges, they might ; and so have the Precedents been always since the making of this Statute, and upon the like Reason, that a Man that takes a second Wife, hath by the Statute the same directions to be tried in the same Shire where he is taken ; yet if taken in *Middlesex*, was always tried at the *Old-Baily* in *London*.

These Statutes were made, because the Statute of 18 H. 6. cap. 19. was looked upon not to be sufficient, for that that Act had reference only to the ancient Tenures, and those that covenanted with the King to provide Soldiers ; whereupon a question afterwards arising, whether several who having then taken prest Money to serve the *Queen* against the Rebels in *Ireland*, and had departed and withdrawn themselves from the Service, should be within those Statutes, in regard some doubt seemed to arise on the same ; but it was resolved by all the Judges of *England*, that those two Statutes of 7 H. 7. Cap. 1. and 3 H. 8. Cap. 5. are all one in effect, and were perpetual Acts : the great doubt and question, whether the Statute of 18 H. 6. Cap. 19. did extend to Mariners and Gunners serving on the Seas, and taking Wages of the King, was in Parliament not long before cleared in these words: *That the said Statute made in the eighteenth Year of the Reign of H. 6. in all pains, forfeitures, and other things, did, doth, and hereafter shall extend as well to all and every Mariner and Gunner, having taken, or who hereafter shall take prest or wages to serve the Queen's Majesty, her Heirs and Successors to all intents and purposes, as the same did or doth unto Soldiers, any diversities of opinion, doubt, matter, or thing to the contrary thereof notwithstanding : But now Mariners deserting the Sea-service are particularly within the Provision of 13 Car. 2. Cap. 9. which hath made the Offence Death ; but the Trial is by a Court Marshal.*

And Land-Soldiers, though in time of Peace, are likewise within the Statute of 7 Hen. 7. Cap. 1. and 3 Hen. 8. Cap. 5. if they take any prest Money to serve the King upon the Sea, or upon the Land, or beyond the Sea, and shall desert the Service ; but that is Inquirable according to the Course of the *Common Law*, where if the party shall depart without Licence, he shall suffer Death, without benefit of the Clergy.

X. If

43 Eliz.

Coke 6. part.
fol. 27.

Rastal doubted
in his A-
bridgment.

Artic. 17.

ters ; which Impunity for such killing, seems allowed of at this day by that Law.

XII. Cases relating to the Jurisdiction of the Admiralty as to Matters sueable there, or at the Common Law.

*Trial where
the Original
Contract a-
rises.*

The Trial shall be where the Original Contract is made, which if in *England*, tho' the subsequent Matter to be done be upon the Sea, the Trial shall be at the *Common Law*. But if the contract and what is to be done all of it is beyond Sea, it cannot be tryed at Law here, but in the *Admiralty*; but if part be to be done here and part beyond Sea, so as it is mixed; then it shall be tryed at Law. As an Action upon the Case upon a Policy of Assurance made at *London*, that a Ship shall Sail from *Melcom Regis* in the County of *Dorset* to *Abville* in *France*, safely, &c. And the Plaintiff declared that the Ship in Sailing towards *Abville*, viz. in the River of *Some* in *France*, was arrested by the King of *France*, and the Issue was whether the Ship was so arrested or not; the Tryal was by *Nisi Prius* in *London*, and resolved to be well brought, tho' 'twas objected that this Issue arising merely from a Place out of the Realm, could not be tryed at Law, for the Assumpsit being at *London* was the ground and foundation of the Action, and therefore shall be Tried here, for otherwise it could not be Tried at all. Cited in *Dowdale Case* 6. Rep. 47. b. *Godboll* 76. and 204.

And so if the Contract be made at Land, tho' beyond Sea, the Trial shall be at Law, tho' what is to be done, be all of it beyond Sea, by laying the Contract made at a Place in *England*, as in *Burdeux apud Isslington* in *Com. Middlesex*. So is the Case of *Slaney* and *Clobery* against *Cotton*, where the Plaintiff sued the Defendant in the *Admiralty* Court upon a Promise made in *Barbary*, to Sail from *Sirborona* in *Barbary* to *Ricumpta* in *Brazeil*, &c. upon suggestion that the Contract was made in *London*, Prohibition was granted; for by *Jones* the performance of the consideration does not give the Action without the Contract, and this was made at Land, tho' beyond the Seas, which may be supposed to be done in a place in *England*. 2. *Rolls Rep.* 486. See *Tucker and Caff's Case* in the same Book 492. and 497. and 2. *Brow.* 10. 11.

A Contract was made at *New-Castle* that a Ship should Sail from *Yarmouth* to *Amsterdam*, Debt was brought upon this Contract, in the Court of *New-Castle*; adjudged, that the Action would not lye there, being a limited Jurisdiction, which shall not have consufance of any matters done in *partibus transmarinis*, but only the Courts at *Westminster*, March 3.

Matters beyond Sea not Triable in an inferior Court.

If one libell in the Court of Admiralty for a thing done upon the Land, and it appeareth upon the Libell, that the thing was done upon the Land, and they notwithstanding that hold Plea of it, A *Præmunire* lyeth upon it; but if the same do not appear within the Libell, then it is not within the Statute of the 13. and 15. of R. 2. c. 5. but a Prohibition shall only issue, 2. *Leond.* 183. In Sir Richard Buckley's Case.

Præmunire for suing in the Admiralty.

The Admiralty hath Jurisdiction of *Flotzan*. *Trefilian* against *Jones* 2. *Keeble* 361.

Admiralty hath Jurisdiction of *Flotzan*.

A Dutch Ship was broken by a great Tempest in a Creek of the Sea, *Infra Corpus Comitatus de Dorset*, the Sailors upon pretence that the Goods in the Ship were *bona peritura* procured a Commission of Seal out of the Admiralty Court to sell them, and the true Owners to prevent such Sale, brought a *Supersedeas*, and upon shewing the Libell to the Court a Prohibition was granted. (1) because the Cause of Action accrued *infra Corpus Comitatus*. (2) Because the Sale of the Goods was good, as *bona peritura*. *Culmer* against *Brand*. 2 *Sid.* 81.

Supersedeas to the Admiralty.

One having taken a Ship as Prize which had *bona peritura* entred into a Recognizance with sureties before the Judges delegate to bring the Money raised by Sale of the Goods into the Admiralty Court before such a day, if they upon a Complaint there depending did not adjudge the Ship and Goods to be Lawful Prize, which they adjudged Lawful Prize, and after at another time cited the Owner before the Judges of the Admiralty, and for his not coming and bringing the Money at the day, they threatned to sue Execution against the Bail or Sureties who were Merchants of *London*, Prohibition was praied, for by their first Judgment or Sentence, their Recognizance was discharged, and they ought not by Colour of this to endanger the Credit of Men of Reputation; but the Court would not grant

Unjust Sentence in the Admiralty where they have original Consufance is no Cause for a Prohibition:

a Prohibition, for they said an unjust Sentence of the Admiralty in a Cause of which they have Original Conu-
sance, is not a Cause of Prohibition. As if Tythes
which in verity are paid, are found not paid in
the Spiritual Court, yet a Prohibition lyes not, and here
the Judges Delegate have sole Power upon this Recog-
nizance, to make Execution or defeat it. *Becks against
Chelscocke 2 Sid. 152.*

Suit there for
not ballasting
a Ship.

The Corporation of Trinity House under pretence
of Letters Patents from Queen *Elizabeth* for the Ballast-
ing of all Ships within the Bridge of *London* and the Sea,
and that no Ship should take Ballast of any other but of
them, sued one *Boreman* (a *Dutch* Man) in the Admiralty
for taking Ballast of another, within the Place afore-
said. *p. Curiam* the Place being alledged to be at *Rat-
cliffe*, a Prohibition was granted; Resolved that the Let-
ters Patents were void, for that thereby a Charge is rais-
ed upon the subject for the private gain of the House,
for they would not Ballast a Ship under 2d. *p. Tun. Bore-
man's c. 2. Brown. 13.*

Stat. 13. 2. 2.
b. 4. and 11.
b. 2.

In the Case of Sir *Hawkins* Vice Admiral of the Coun-
ty of *Devon* who was prosecuted in the Starr-Chamber
for abetting and comforting *Hull* and other notorious Pi-
rates. It was there resolved that by the Common Law
the Admirals ought not to meddle with any thing done
within the Realm, but only with things done upon the
Sea, and also by the Stat. of 13 R. 2. c. 5. 2. b. 4. c. 11.
and 11. b. 2. c. 3.

It was likewise resolved, that the said Statutes are to
be intended to hold Plea, and not of a power to award
Execution; for the Judge of the Admiralty notwithstanding
these Statutes may do Execution within the Body of
the County.

The Court of Admiralty is not a Court of Record,
because they proceed there according to the *Civil Law*.
13. Rep. 51.

Where one admits the Jurisdiction of the Admiralty
by pleading there; no Prohibition shall be granted. *Jen-
nings against Audley, 2. Brow. 30. 12. Rep. 77.*

Suit there
for Contract
upon Land
Prohibition.

Cradock bought divers things within the Body of the
County, which concerned the furnishing a Ship, as Cor-
dage, &c. the Vender sued him in the Admiralty Court;

a Prohibition was granted, 2 *Brow.* 37. *Cradock's Case*, *Owen* 122. 3. *Keeble* 552. *Merryweather* against *Mountford*.

The Defendant being Master of a Ship, of which the Plaintiff was Owner, the Ship was taken by Pyrates upon the Sea; and to redeem himself and the Ship he contracted with the Pirate to pay him 50 l. and pawned his Person for it, the Pirate carried him to the Isle of Scilly, and there he paid it with Money borrowed; and gave Bond for the Money at his Return, after the Redemption both of the Ship and himself he sued in the Admiralty for the 50 l. and had a Sentence for it, and thereupon a Prohibition to the Admiralty was prayed but denied, because the Original Cause began upon the Sea, and whatever followed was but accessory and consequential. *Hard.* 183. *Spark* against *Stafford*. Laws of the Sea. 427. Prohibition was granted to the Admiralty Court on the 22d. and 23d. *Ca.* 2. *cap.* 26. *Sett.* 11. in Suit there for the Forfeit of a Ship on Selling Wares in Ireland without breaking Bulk, being put into Ireland from America, by contrary Winds, this being Triable in the Plantations or any Court of Record in Westminster. *Pidgeon* con. *Trent*, 3. *Keeble* 640, 647, 651. (*vide Librum.*)

A Master of a Ship agreed with certain Merchants concerning a Voyage and Received Orders from them to lay in Provisions of Meat and Drink, and to provide Mariners, &c. and after the Voyage was finished, the Merchants refused to pay the Master of the Ship, what they had agreed for, upon which he Libell'd against them in the Admiralty, Prohibition was granted upon the Statute of 2. R. 2. *cap.* 3. the Contract being upon Land, and denied the Case. *Hill.* 8. *Ca.* 1. *Cro.* 296. which saith that when a Thing is in its Nature Maritime as in the Cases of Mariners Wages, the Admiralty shall have the Consuance of it. *Woodward* against *Bonishan*, *Raymond*. 3. and 3 *Levinz.* 60. *Coke* against *Cretcher*, &c. 2 *Vent.* 181.

If a Contract or Obligation be made upon the Sea, yet if it be not for a Cause Marine, the Suit upon this, shall be at Common Law, not in the Admiralty. *Hob.*

If the Original Contract be made at Sea, on a Marine Cause, and after reduced into Writing at Land, the Com-

1. *Lev.* 243.
2. *Relv.* 135. 173.
1. *Sid.* 320.
2. *Saun.* 260.
2. *Lev.* 25.
1. *Ven.* 173,
308.
1. *Sid.* 367.
3. *Cro.* 685.

Prohibition does not lye for Mariners Wages.

Contract not Marine made at Sea.

Contract at Sea settled at Land.

mon Law not Admiralty shall have the Conusance. Hob. 79. 212. Palmer against Pope.

Common
Law pre-
ferred.

If a Charter Party be made in *England* to do certain things in divers Places upon the Sea, tho' that no Act is to be done in *England*, but all upon the Sea, yet no Suit shall be in the *Admiralty* for NonPerformance of the Agreement; for the Contract is the Original and is out of their Jurisdiction, and where part is Triable at *Common-Law*, and part in the *Admiralty*; the *Common Law* shall be preferred. *Maldonado and Slaney 1 Roll Abr. 532. 533.*

Prohibition
to the Admi-
ralty for pro-
ceeding to
execute an
interlocutory
Sentence of a
Foreign Ad-
miralty.

1 *Ro. Ab. 530.*
pl. 12. Raym.
473.

It was moved for a Prohibition to the *Admiralty*, because the Libell was to execute a Sentence of the Alcade which is the *Admiralty* at *Malago* in *Spain*, upon a thing done within a Port there, and after a Rule for a Prohibition nisi, 'twas moved that no Prohibition should be, for tho' this Court will not execute the Sentences of any Foreign Court, in as much that it is governed by a distinct Law, yet these of the *Admiralty* may, and this is their use to do so, for this that all the *Admiralty* Courts in *Europe* proceed by the same Law, viz. the *Civil Law*, and *Wibrel and Wiat's Case 5. Fa. was Cited*, to be adjudged accordingly. But upon Reading the Libel in the Principal Case, it appears, that the Sentence was not Definitive, but Interlocutory concerning a Matter that sounds as an Action upon the Case, and no Sum set; and also the Alcade is not as an *Admiralty* there, and for this a Prohibition was granted. *Jurado and Gregory, 1. Sid. 418. 1. Levinz. 267. 1. Vent. 32. and 2. Keeble 511, 610.*

Rescus and
Contempt
triable there.

Motion for a Prohibition to the *Admiralty*, for that they Libell'd against one for rescuing a Ship, and taking away the Sails from one that was executing the Process of the Court, against the said Ship, and for that in the presence of the Judge and Face of the Court, he assaulted and beat one, and spake many Opprobrious Words against him. Now seeing that these Matters were determinable at Law, the Ship being *infra Corpus comitatus*, and they could not adjudge damages to the Party, or Fine or Imprison, a Prohibition was praied, but denied, for they may punish one that resists the process of their Court, and may fine and imprison for a contempt tho' they are no Court of Record, but if they should proceed

proceed to give Damages, they would grant a Prohibition *quoad* that. *Sparkes, &c.* against *Martyn*. 1. *Vent.* 1.

A Prohibition prayed to the *Admiralty*, where there was a Libell for a Ship taken by Pyrates, and carried to *Tu-cho* sold at *Land*. and there sold, for that it did not appertain to the *Land*. Court to try the Property of the Ship being sold upon *Land*. *Curia* in regard it was taken by Pirates, it is originally within the *Admiral* Jurisdiction, and so continues notwithstanding the Sale afterwards upon the *Land*. Otherwise where the Ship is taken by Enemies, for that alters the Property. Contrary to my Lord *Hobart* in the *Spanish Ambassador's Case* 78. 1. *Vent.* 308. *Anonymus*. 3. *Cro.* 685.

Goods taken by Piracy, Triable there tho' sold at *Land*. *Relo.* 135. 173. *Hard.* 183. 1. *Sid.* 320, 367. 2 *Saun.* 260. 2 *Lev.* 25. 1 *Ven.* 173.

If Ships or Boats are found on the Sea or upon the Coast, without any Living Creature therein, and no Man claiming the same within an Year and Day, the finder formerly used to have one Moity, and the Prince the other Moity, but now 'tis left to the discretion of the Admiral, what the finder shall have for his Travail, Charges, Danger. And if the finder conceal such Goods, whether belonging to the Ship, as Anchors, Timber or other Goods, he shall not only lose his Part, but be fined at the Will and Pleasure of the Admiral.

Ships found at Sea belong to the Admiral.

If Whales or other Regal Fish, Ships or Boats with- out any Living thing in them, be driven by force of Wind or Waves only, to any Coast or Land, then all doth belong to the Admiral; *Lex Mercat.* 120.

Royal Fish Deadlands.

See more of this Matter. 4. *Inst.* 134, &c. of the Court of *Admiralty*. 1. *Roll. Abr.* 528, &c. Title *Admiralty*.

After Sentence in the *Admiralty* Court for the seizing of a Ship, Trover and Conversion at Law will not lye, *Beake contra Thynwhitt* Laws of the Sea. 425. Trover after Sentence will not lye.

Hutchinson killed one *Colson* in *Portugal*, and was acquitted there of the Murder, the Exemplification of which Acquittal he produced under the Great Seal of that Kingdom, which by the Opinion of all the Judges was such an Acquittal by their Law, that he could not be Tried here again.

Acquittal of Murder in the Admiralty in a Foreign Kingdom, he shall not be Tried again here.

The *Admiralty* hath not Jurisdiction of wrecke. 5. *Rep.* 106. 2. *Inst.* 167. 4. *Inst.* 154. 15. *R.* 2. c. 3.

Case upon the Statutes. 13. *R.* 2. c. 5. 15. *R.* 2. c. 3. and 2. b. 4. c. 11. for suing in the *Admiralty* for matters done upon for matters at Land.

Case for suing in the Admiralty for matters at Land.

upon the Land, and declared that the Plaintiff was going from the Port of *London*, with his Ship laden with Merchandizes, and that the Defendant brought a Suit in the *Admiralty* to stay the Ship, till caution should be given, that she should not Traffick with Infidels, within the Limits of the Charter of the *East-India* Company, and that they procured the Ship to be arrested by Process of the *Admiralty*, and to be detained, by which the Plaintiff lost the Profit of his Voyage, upon not guilty pleaded, a Special Verdict was found, *viz.* they found the Charter of the *East-India* Company of 13. Ca. 2. by which they are incorporated, and had the sole Trade to the *East-Indies*, granted to them with a Prohibition to all others to Traffick with *Infidels* there upon pain of Forfeiture of Ship and Goods, and that the Plaintiff had prepared a Ship and Goods to go to the *East-Indies* to Traffick with Infidels within the Limits of the *East-India* Company, upon this they Petitioned the King in Council to stay the Ship, where an Order was made to the *Admiralty* to stay the Ship by their Process, which issued accordingly, and the Ship was stay'd, *prout*, &c. all which was done by the Defendants as Agents of the Company, and they as Agents paid the Fees of the Prosecution, and if guilty damages for the Plaintiff in duplo 1500*l.* so upon Araignment judgment for the Plaintiff and an Error affirmed. *Sands* against Sir *Josias Child* and others. 3. *Levinz.* 351. *Alike Case* 1. *Vent.* 47. *Home* against *Ivie*.

4. *Inst.* 138.

C H A P.

C H A P. VII.

Of Dominion established by Treaties of Alliance in general.

- I. Of Treaties their ends.
- II. Of the matters considerable in the making of them, and how the overtures are made.
- III. Of the various sort of Treaties, and first of those by interview.
- IV. Of the pretexts generally made to obtain such Treaties.
- V. Of Princes equal the honour is to be paid by him in possession.
- VI. Of Treaties by Princes unequal.
- VII. Of Treaties secret and open.
- VIII. Of things requisite for Princes during such Treaties.
- IX. Of Places proper for Treaties.
- X. Princes where obliged to treat personally, and where not.
- XI. Deputies their demeanour generally considered in Treaties.
- XII. Of the Clauses generally to be considered in Treaties general and particular.
- XIII. Of the nature of Treaties generally considered as to their ends, and where they determine by the Death or Dispossession of a Prince, and where not.
- XIV. Of Treaties to what end, and how they have been strengthened in England.
- XV. Of the Causes ordinary procuring such Leagues.
- XVI. Of Leagues by way of Mediation tending to the procuring of a general Peace with Warranty.
- XVII. Considerations on Leagues defensive and offensive, and of the

Advantages and Disadvantages thereof in reference to the Estate confederate.

- XVIII. Leagues defensive construed offensive in favour of the oppressor.
- XIX Contribution, the difficulty in regulating the same to the satisfaction of the Persons interest'd.
- XX. Of Leagues concluded by Deputies, and the Difficulties used to delay, by which designs may secretly be carried on.
- XXI. Consideration had on Leagues made for carrying on some particular Enterprize.
- XXII. Of the Causes that generally occasion a Rupture.
- XXIII. Of the Obligation on Confederates in reference to mutual Succours.
- XXIV. Of Aid granted to particular and common Allies when invaded by one another, and of Protection granted a People when oppressed, whether Aid to such may be consistent with a League.
- XXV. Whether the Oath taken for the Performance of the League be personal, or binds the Successor, and of the Interpretation of the same.
- XXVI. Of Leagues made with Princes when driven out of their Countries, whether they remain valid and firm.
- XXVII. Whether Leagues may be entered into by Christian Princes with Infidels.

I. **T**reaties are occasioned by a wise and prudent Care of inspecting the Motions of Neighbours and of their

their Affairs, the which are generally reduced to these Three Heads upon the Considerations,

1. How a Prince should govern himself with his Neighbours.
2. In gaining a Credit among them, and to have a part in their Deliberations.
3. Is the main, which is to pierce into his Neighbours designs; for those Centers being discovered, a Prince easily knows how to draw his Lines.

II. In Treaties, the first thing to be considered is the manner of making the Overture; and therefore it may so happen, that of two Princes who are Enemies, the one will not seek unto the other for an accord; therefore the general *Medium* is, that the motion be propounded by some greater Prince, or by some Neighbour that is a Friend to both,* and sometimes the Ministers of two Princes meeting accidentally, if they be employed, yet propound an Accommodation. When a Prince or State is exasperated with another, and having gotten an Advantage, will often refuse to treat any where but in his own Country, nor that unless first sought to by a submissive Request, as by Letter, &c. So they of † *Holland* and *West-Frieze-land* considering the miserable Distress and incorrigible Disorders of their People, did submit thus to confess their Errors.

* *Argenton* and a Steward of the Duke of *Mantou* meeting at *Creal Carragio*, to condole in their Masters names for the Death of the Marquess of *Forcat*, made an overture

for the Treaty of Peace betwixt *Charles* the Eight and *Lewis Sforse*. † *March* 8. 1653. by order of those States, subscrib'd *Herbert Van Beaumont*; and afterwards by a Letter from the *States-General* praying a Neuter place, *April* 30. 1653. then by a Petition $\frac{2}{3}$ *June* after. *Leo ab Aitzma* fol. 817, 818, 825.

III. Treaties are acted either by the interview of Princes, or by persons sufficiently commissioned for that purpose.

Those that are by interview, have been often disapproved, though often practised; but that depends rather on the Estate of Affairs, and the conformity and diversity of Honours, and manner of living of the Princes and their People, than of the interview: that of *Lewis* the Eleventh with Duke *Charles* of *Burgundy*, and of the same King with *Edward* the Fourth of *England* past fairly: and in all such Treaties they govern themselves in reference to their supplies, according to the Confidence which they repose in each other. † But those interviews of Princes have ever been

† *Jugurtha* taken by his Fa-

been observed dangerous; for Princes measure their quality, not by the extent of their Dominions, but by the absoluteness of their Power: So that he that is Supream and Independent in his own Country, counteth himself equal to any other Prince, how great soever. Perchance some youthful Kings may disport and solace themselves in one another's Company, whilst yet Pleasure is all the elevation of their Souls; but when once they grow sensible of their own Greatness, (a Lesson they will quickly learn, and shall never want Teachers) then emulation will be betwixt them, because at their interview they cannot so go in Equipage, but one will still be the foremost, either his Person will be more proper, or Carriage more Court-like, or Attendance more Accomplished, or Attire more Fashionable, or something will either be or be conceived to be more Majestical in one than the other: And Corrivals in Honour count themselves eclipsed by every beam of State which shineth from their Competitor; therefore some hold the best way to keep great Princes together is to keep them asunder, accommodating their Business by their Embassadors, lest the meeting of their own Persons part their Affections, as it fell out between King Richard of England and Philip of France, and Maximilian the First and Lewis the Twelfth.

ther-in-Law
Bacchus and
delivered to
the Romans;
Charles the
Seventh of
France, at a
personal
Treaty with
the Duke of
Orleans, slew
the Duke,
though a Soa
vereign
Prince.

Mayer lib. 15.
Phi. Comines
lib. 4. cap. 10.

Richard Hovea
den in Rich. 13
fol. 666.

IV. It is presumed, that the Personal Treaties of Princes are not for matters small and trivial; therefore it is an undoubted Maxim, *That as Jealousies may be increased amongst Neighbours, by reason of such personal interviews, so they must find out some apparent and important pretext, which being made known and published to remove the Jealousies of their Neighbours, they may then under such colour and shadow, treat the most secret of their Affairs.* So Pope Clement the Seventh under the borrowed Pretext of a general peace and League against the Turks, (which founded pleasingly in the Ears of all Princes) at Marseilles concluded the Marriage of his Niece with Henry the Second of France.

V. But if of two Princes, the one goes home unto the other, he is bound to do him the Honour of his House; And if the Prince be inferiour to him, he commonly sends forth some of the principal Officers of his Court to receive him; but if he be his equal in Quality, as being both

H

Kings,

Kings, although there be some debate betwixt them for precedence, if he come first to the place where the Treaty is to be made, he must go in Person and not by Proxy.

Vide Amilius Paulus his History of France and Ferron his supply of the same, of the like of the Duke of Orleans, afterwards Lewis 12th. upon the failure of issue male of Charles the 8th.

In the interview that was between *Lewis* the Twelfth and *Ferdinand of Arragon* at *Sawona* (which then belonged unto the French King) *Lewis* the Twelfth at the approach of *Ferdinand's* Galley (before he could land) enter'd into it, accompanied only with his Guard, to testifie his confidence, and thereby to assure King *Ferdinand* of that which he had promised he should find in him; and at their going to Land, King *Lewis* left the Right hand to *Ferdinand*; who lodged in the Castle, as the most Honourable place, and himself went to the *Bishoprick*.

VI. By the Laws of *Treaties*, when two Princes unequal in Quality parley, the Inferiour is to come first to the place of congress there to attend the Greater; yet the contrary hath been most commonly observed upon this very reason, that he that is less ought first to wait on the Greater, and from thence go to the place appointed for the Parley; and this was particularly done at the interview of Pope *Clement* the Seventh and King *Francis* the First, although that *Marseilles* were in the King's Subjection.

VII. Again, *Treaties* by those that are sufficiently commissioned for that purpose, are to act either secretly or openly. *Treaties* close or Secret are usually made in order to the compleating or settling of Leagues between two Princes or States, sometimes by entertaining him with whom they treat under such a Pretext, to deceive him in the end, at other times to surprize an Enemy, or to assure a Prince of two Enemies, treating with one secretly, the other openly, and the like. These are the ordinary Policies among Princes, and wherewith the wisest of Kings†, and the most knowing Councils have been deceived and abused even to accept of a Treaty, when at the same time the Proposer hath no other thoughts than to betray them: the Spaniards have been famous at these Projects. Memorable was that design of theirs to interrupt the League which was ready to be made between the Princes of *Italy* and Pope *Clement* the Seventh after the Battle of *Parvia*, propounding unto the Pope to treat and accord, the which not only hindred the League, and staid the preparations

† So *Maximilian* and *Ferdinand* having twice abused *H. 8.* proposed a third, which was that he would resign up the Imperial Crown to him; the Resignation is sent

Chap. 7. Of Leagues by Alliantes equal.

115

Preparations of War which he might make, but also caused him to discharge the Troops which he had drawn unto him for his safety. So Bourbon, General of the Imperial Army, entertained the Pope with an accord, whilst his Army marched to the Walls of Rome.

to England and approved, H. 8. is to come to Aquisgraves to receive the Crown, and Maximilian is

to accompany him to Rome to receive the last Right of the Imperial Dignity, and having given him the Investiture of Milan in feodo more Imperiali, then in possession of the French, and in enmity with the House of Austria: all things being thus concluded, and H. 8. having paid the Monies agreed on, and made ready his preparations, Charles the Fifth and Grandson of Maximilian, is a rub in this League, who must be first removed; thereupon the old Fox the Emperor sends a Proposal, that he would come first into the Netherlands to take off his Grandson, which while agitating, he strikes up a secret Peace with the French King, and so H. 8. is betrayed a third time and the agreement refused to be complied with, Cotton Treaty of Amity fol. 99.

VIII. Hence it is, that during Treaties, be they open or secret, the Princes or States concerned in them, must watch the more carefully, have the diligenter Eye, and by all the ways imaginable reinforce their strength, not only to frustrate their Enemies of all hopes to surprize them, but to the end the Consideration of their Force and Opulency may put them in a posture to obtain Conditions of more Advantage. Besides, it is an undeniable Maxim, that no treaty must be held firm, valid, and concluded, unless it be ratified by that Prince or State with whom the same is made, especially if it be with a Prince whom they detain Prisoner; for by † Law the force by the which he hath been constrained to promise, will at least dispense with him so far as to re-advise, if not to break.

† Sacramento quidem vos tenete qui potuit; quum projectis facibus & de-

posito Imperio privatus & captus ipse in alienam venisset potestatem? Curio in Caesar, to those that had been the Soldiers of Domitius, so spake, lib. 11. de Bello Civili. Vide Gro. lib. 2. cap. 13. §. 18. Pope Clement the Seventh refused to ratifie the Treaty with Duke Ferrara which he made when a Prisoner, saying, That it was a dishonorable thing for a Man in Life to ratifie a matter done in his Name when dead, not consistent with his Honour nor Interest. So Francis the First excused himself to ratifie the Treaty of Madrid, upon the inhumanity done to him by the permission of Charles the Fifth, they being extorted from him, nor did they take place, though the King left his Children as Hostages.

IX. Again, as in the Parlies of Princes, the place where the Interview is to be made is very considerable; so is it

H 2

in

November 7.
1659.

in Treaties which are transacted by Embassadors, Agents, Envoys, &c. If it be to compleat a Peace, or settle a League, it must not be too far from the Confederates, but at some convenient place, to the end they may have the more speedy Answers from their Principals; but then the first is always to be in some place Neuter, or sometimes upon the Confines of Kingdoms; for that it is neither reasonable or honourable to treat a Peace in the Territory of one's Enemy; but the latter touching Leagues may be any where. That of *Edward* the Fourth with *Lewis* the Eleventh was in the Territories of the Duke of *Burgundy*, but that was personal: And that between *France* and *Spain*, concluded by Cardinal *Mazarine* and *Dom Lewis Mendez de Haro*, Plenipotentiaries of both Crowns, was in the Isle of *Pheasants* in the River *Bidassoa* upon the Confines of the *Pirenæan* Mountains. And the last great Treaty which begun at *Cologne* in the year 1673. under the Mediation of *Swedeland*, in order to put an end to that War wherein most of the Crown'd Heads of *Europe* were involved, was lookt upon as a place proper; but the seizing of Prince *William* of *Furstemberg*, and the taking of Forty thousand Crowns out of the Waggon of the *French* Embassador in a Neutral City, broke off that Negotiation; and though the violence committed on this Prince, by the Emperor's Ministers, and the injury done to the *French* King, gave ground to fear, that there was no Peace to be expected, and that the Most Christian King would never consent to the renewing of the Treaty, unless reparations were first made for those two injuries: Nevertheless, at the instance of the King of *England* (whose Mediation was generally embraced by all the Princes concerned in that War) and at the solicitation of the Bishop of *Strasburg*, who publicly declared he preferred the Advantages of Peace before the Liberty of his own Brother. *Nimmegen* was pitch'd upon as a place neuter and proper for a Treaty, and thereupon the *French* King, 17 February, 1675. named for that Effect the Duke of *Vitry*, Monsieur *Colbert*, and the Count *D'Avaux*, his Embassadors.

X. Embassadors having received Orders to treat, the Prince, to whom such are sent, is not by the Law of Treaties bound to treat personally, but only to depute some

Some of his Council for that Effect; the reason is, for that the Dignity of a Prince may receive some detriment which cannot be maintained amidst the Contestations which happen in Conferences.

But if an Ambassador be deputed as Lieutenant to a Prince, there indeed such Commissioner is not bound to treat but only with the Prince himself: and so it was where the Bishop of Gurgis, was deputed by the Emperor to Pope Julius the Second; the Pope commissioned three Cardinals to treat with him; but the Bishop having notice in what quality he was like to be received, commissioned three Gentlemen to confer with them, excusing himself upon other Affairs, which afterwards was explained, that he came not as a single Ambassador, but as a Lieutenant to the Emperor, in the which Quality he had been received at Rome by the Pope: yet it hath so happened, that Embassadors, if not admitted to a personal Treaty, have refused the Discharge of their Commission, and so did Chancellor Marvel, Embassador from the French King, who delivered his Message to Philip Duke of Burgundy, was interrupted by Charles the Duke's Son. *I am sent* (said he) *not to treat with you, but with your Father*; and Mr. Wade, who being commissioned by Queen Elizabeth to Philip King of Spain, would by no means admit himself to be turned over* to the Spanish Privy-Council, but would either have Audience from the King himself, or would return without it.

Julius Ferretus de Legatis Principum, & de eorum fide & officio.

There is commonly in the instructions provided for the Embassador in that point, if the matter should come into debate. *Phil. Comines lib. 1.*

*Camden Eliz. in An.

1584. fol. 38a.

XI. The Deputies being assembled, their Seats are Considerable, they having no power to quit any thing of the rank which their Masters ought to hold: and by the Law of Treaties the first place is at the head or end of the Table, (if there be one) the second is the first on the right hand, and the third is the first on the left hand of him that is at the end: and if there be many Deputies to one Prince, they usually sit at one side, to have the more facility to confer together, if it be needful.

XII. The Embassadors having concluded and settled their Places, their Commissions of each side are to be inspected and considered: and therefore it is an undoubted Maxim, That when they are general or ambiguous, the Principals have no will to conclude; or if they are fair and plain, yet there may be wanting power to conclude.

So Julius the Second did, who finding himself preft to make Peace with Lewis 12. sent Cardinal of Final, and Bi-

shop of *Tiquelly* or having power to conclude, it may be with a Salvo, till they are ratified.

so *Paris*, but never armed them with

Power to conclude: this was to frustrate the important instance of the Consistory.

The principal Clauses generally are,

1. Either for Peace or Truce.
2. For Restitution of that which they pretend hath been unjustly taken away.
3. For the Cession of Rights.
4. For Limits and Bounds, the which if they cannot regulate, they put them in suspence, or else they make some Act which may interrupt the prescription of him which holds them.
5. For passage, with Consignation of Hostages.
6. For Forts or Castles for Assurances.
7. For an Offensive and Defensive League.
8. For Neutrality.

In the managing of all which, and of all other matters proper for such Treaties a special regard must be had not to move for a Person odious to him with whom the Treaty is made, nor to yield to the first demands though never so just, but resist them stoutly; but if danger is eminent, then it is a certain Maxim, *Not to study so much to Negotiate with advantage, as to provide for safety.*

XIII. Treaties which are made with our Neighbours as Friends, are called *Treaties of Alliances, equal or unequal.* The *equal* is either of single Friendship only, for the entertainment of Traffick, or for aid and succour; that of succour is for the *Defensive* or *Offensive*, and sometimes for both, with or against all Men, or against some certain Princes and Republicks, and their Alliances are contracted, either from *Estate* to *Estate*, and for the Preservation of the *Estates* of each other (in which case by the death of the Prince they may not be interrupted) Or else they are contracted betwixt *Prince* and *Prince*, and then the death of one suspends till a new Treaty hath confirmed it, unless there is a time certain prescribed by the *Treaty*, to the which the Alliance must continue after the death of the *Prince*; Or else they are made from an *Estate* to a *Prince*, where the death of the Prince does likewise, if not dissolve, yet at least suspend till a new Treaty of Confirmation

The Leagues between the Crown of France and Spain, are commonly between Kings and Kings, Realm and Realm, and Man and Man of their Subjects, and have in time past been lookt upon to be the firmest of Al-

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tion of the precedents, although by the Laws of England *Phil. Comines lib. 2. cap. 8.* And in the very Alliance. *Rex non intermoritur.*

ance with France concluded July $\frac{21}{31}$. The first Article is in these words : *That there be an universal and perpetual, true, and sincere Peace and Amity between the Most Christian King and the King of Great Britain, their Heirs and Successors, and between the Kingdoms, States, and Subjects of both, &c. Vide 9 E. 4. 2. s.* The League then made with the Scots, and likewise between Edward the Fourth and the Duke of Burgundy. *Phil. Comin. l. 3. c. 6.*

XIV. Sometimes *Alliances* are contracted for an Enterprize and for one effect only, in the part in which the Allies are interessed, and such are generally called *Leagues*, * *Rot. Pat. 4. H. 5. num. 4. Coke 4. Inst. 156. Grot. de jure belli & pacis l. 2. c. 15. §. 3.* which in England have been sometimes confirmed by Act of Parliament *.

Leagues are such Agreements that are made by the Command of the Supreme Power, and whereby the whole Nation is made liable to the Wrath of God, if they infringe it.

All Leagues or Safeconducts are, or ought to be of Record, that is they ought to be inrolled in the Chancery, to the end the Subject may know, who are in Amity with the King, and who not, who are Enemies and can have no Action here, and who are in League and may have Actions Personal here, 4 *Inst.* 152.

Leagues commonly are *Offensive*, but in effect they tend to attempt against some one, and in the bottom are lodged Articles of Secrecy for the Enterprize : and such was that of Cambray against the Venetians, in which they borrowed the pretext of Religion and the Peace of Christendom.

Treaty of
Cambray, the
Confederates

of which were Pope Julius the Second, the Emperor, Kings of France, Spain, and Arragon, Anno 1558. *Vide History of the Republick of Venice fol. 87.*

XV. The ordinary causes for which Princes and Republicks make Leagues, are either to facilitate a Conquest, as that that was made between Lewis the Twelfth and Ferdinand of Arragon, for the Realm of Naples, or to balance the Forces of one that is more mighty, in hindring him that he grow not greater ; but Arms ought not to be taken to diminish such a Neighbour's power, for that fear is uncertain ; but prudent Leagues may be made for diminishing their power.

*Sed ut vim pati
posse ad vim
inferendam jus
tribuat, ab
omni aequitate
abhorret. Gro-
tius de jure
belli & pacis
l. 2. c. 15. §. 17.*

The *English* made a League to succour the *Hollanders*, not only to balance the growing opulency of the *Spanish* Monarchy, but likewise to encrease her own by the Alliance of the *Dutch*. *Quid sequitur?*

XVI. Again, Leagues may be made for the procuring of a general peace by way of *Mediation* of their Neighbours in War, and such was the late Treaty of *Nimmegen* mediated by the King of *England*, and concluded *Aug. 10. 1678.* between the Ambassadors and Plenipotentiaries of his most Christian Majesty on the one part, and the Ambassadors and Plenipotentiaries of the *States General* of the *United Provinces* on the other part; such was also the League of Union propounded by His late Sacred Majesty, and afterwards concluded betwixt him and the *States General* of the *United Provinces* for an efficacious *Mediation* of Peace between *France* and *Spain*, His Sacred Majesty of *Britain* having a Prospect to what afterwards happened, and of a War, wherein most inevitably would be involved most of the Princes in *Christendom*; to the effecting of which Peace, His Majesty and the *States General* did obtain a promise from the *French* King to the *Dutch*, to lay down Arms, on condition the *Spaniards* would formally and solemnly, by a Treaty of Peace, quit to him all those Places and Forts, together with the *Chastellenies* and their appurtenances, which they by force of Arms had taken in, or fortified in the then last year's Expedition; or, otherwise that the *Spaniard* be brought to transfer to the *French* all their remainder in the *Dutchy* of *Luxemburg* (or to the County of *Burgundy*) together with *Cambray* and *Cambresis*, *Douay*, *Ayre*, *St. Omers*, *Bergue*, *St. Avinox*, *Fuernes*, and *Lynk*, with the *Bailiwicks*, *Chastellenies* and all other their dependencies; and the *French* King to restore to the *Spaniard* all Places, Territories, which they have by Arms taken since their entrance into *Flanders*, on Condition that the *States General* do reciprocally undertake and secure to the *French*, to prevail with the *Spaniard* to consent to the same Conditions, which once effected would (as was hoped) initiate the tranquillity and be the interest not only of the two Warring Crowns, but of all other the Princes of *Christendom*. To the effecting of which there were several Articles agreed; and likewise it was agreed, that if a Peace should happen to be made,

League of Union between his Majesty of Great Britain and the *States General* of the *United Netherlands*, concluded at the *Hague*, Jan 23 Ann 1668.

His

His Majesty and the *States General* should become Warrantees, and a place left for any other Prince or State to come into the same, who should think it their Interest to keep the Peace of *Christendom* undisturbed, and to restore the *Low-Countries* to their tranquillity: there was provision made likewise by the same, for the Forces of each of the Warrantees to be used against those that should break and violate the same, obliging them to cease the violence, and repair the Party injured.

XVII. A *Defensive League*, which hath no other benefit but a necessary defence, and in the which mean Estates are in a manner equally interess'd, last usually longer than an *Offensive League*, which is voluntary, and from the which either of the *Confederates* will easily part when he hath more interest: So as in *balancing* the interest of the one and the other, he that shall find himself accompanied with distrust, and an opinion to be irreconcilable to the common Enemy, generally proves the most firm in the League.

But a Defensive War is unjust on his part whogave just cause of War.

The Answer of the Ambassador from

Prætorium to the Senate:

Si bonam dederitis & fidem & perpetuam;

si malam haud diuturnam, Liv. lib. 8. 21.

The *Wisdom, Courage, Means, and Constancy* of the Prince or State is to be considered; so likewise the *distance* of the *Places*, as well in regard of those with whom they unite, as of those against whom they make the Leagues.

XVIII. *Leagues* having no other limitation, but the end of the Enterprize for which they are made, have admitted many large debates in cases of accident: For instance, If an Enemy shall take the Country, for the defence whereof the League was made, the Question has been whether the *Confederates* be bound to assist him who hath lost it, in the Recovery; some have held, that the *Defensive* did not extend so far; notwithstanding if there were no Treaty, which had concerned this Conquest, yet it would seem more reasonable to comprehend the Recovery in the defensive, if it be general. For as its end is to preserve the *Allie* in his State, and to attain it, the Forces must not only remain in the Country of the *Allie* to attend the Enemy; but after denunciation and other acts of Hostility done by the Enemy, they must enter into his Country, to the end to prevent him or divert him

Pontius Samnis after restitucion made to the Romans, and the Author of the breach yielded up, expiandum (saith he) est quicquid ex fœdere rupto irarum in nos cœlestium fuit. Satis scio quibuscunque *Allie* Diis cordi fuit subigi nos ad necessitatem cedendi res, iis non fuisse cordi

*iam superhè à
Romanis fæde-
ris expiationem
spretam: And
a little after,
What more
do I owe to
thee, O Ro-
man? what to
the League?*

him from attempting any thing against the *Allie*, the *Offensive* being judged by the *aggression*, and not by *that which follows*; by a stronger reason they ought to enter into the Country conquered from the *Allie*, for the recovery thereof; but excuses in this kind proceed from those who fail in their faith, courage, or means to recover.

*An. 1515. Vid.
Sir Robert Cot-
son Remonsf. of
the Treaties
of Amity and
Marriage.*

XIX. *Contribution* is one of the main ingredients in a *League*, and is of great difficulty to regulate. It is made either in *Men* or *Money*; the *Men* are entertained by all *Parties*, or by him only that hath need, or otherwise as the *League* is. *Henry* the Eighth made a *League* with *France* the *French King* against the *Emperor Maximilian* and *Ferdinand*, for the *Recovery of Milan*, which he did, for the *protection of his Neighbour*, and *Reduction of the Swisse* from the *Imperial side*, for which he employed the *Bastard of Savoy*; the agreement was of reciprocal *Succour of 10000 Men*, if the *War* were by *Land*, and of 6000 if it were made by *Sea*; and in all other occasions, the *French King* was bound to assist the *King of England* with 12000 *Lances*, and he the *King of France* with 10000 *Foot* at his charge that had need.

So where *Contribution* is concluded for *Money*, there are difficulties that do arise from the *Person* or *Place* where it must be kept; to deliver it into the hand of the strongest, is not safe, for fear they shall not be able to call him to account; to lay it in a weak place, were to expose it to the attempt and force of the strongest, or to him that shall first take Arms; but it has been usual for the sum not to be advanced till after the War begun.

*Andrea Mauro-
ceni Hist. Ven.*

XX. *Leagues* concluded by the *Deputies* of the *Confederates*, there sometimes falls out a difficulty who shall ratifie and declare himself first. In the *League* which was made between *Francis* the First, the *Pope*, and the *Princes of Italy*, the *King* refused to ratifie until the *Pope* and *Venetians* had ratified before him, and in that he so cunningly wrought, that he procured the *Collegues* to declare and

and begin the War, whilst that he treated secretly for himself, to the end he might make his Conditions with more advantage; this he declared was for fear those Italian Foxes should shew him the like.

XXI. Leagues made for an Enterprize succeed seldom according to the hope of the Allies, if the Enterprize be long; for besides that the preparations be long, the opinions divers in the pursuit, the resolutions inconstant, the interests of Princes or States in a League may change with time, or with the practice of him against whom they are in League, in withdrawing some one of them, or making him to suffer more loss than the rest; for seeing himself ill defended or succoured by his Confederate, and that he was in a greater danger to lose than his Companions, he then studies to retire * and to make his accord apart, as did the Venetians with the Turks, after the loss of Cyprus.

* If one part hath violated the League,

the other may depart from it; for the several Heads of the League have every one the force of a Condition, so Grotius conceives l. 2. c. 13. §. 15.

XXII. The ordinary causes of the Rupture of Leagues are distrust and jealousy, as if one hath had conference with the Enemy, without the consent of the rest; if that which serveth for the safety of one, diminish the safety of the other, inconstancy, variety, cowardice, division, usurpation without the consent of the others.

So if he treats with the Enemy, not comprehending the other Allies, but as Adherents; as Lewis the Twelfth left the League of the Venetians, for that they had made a Truce with him, and had presumed to name him only as an Adherent. It was the opinion of Byran, that if all the Subjects of England would make War with a Confederate Prince or Republick in League with the King of England, without the assent of the King of England, such a War was no breach of the League; and upon the same reason were the resolutions of the Judges in the Duke of Norfolk's Case, where the Question was, Whether the Lord Herise and other Subjects of the King of Scots, that without his assent had wasted and burnt divers Towns in England, and proclaimed Enemies, were Enemies in Law, within the Statute of 25 E. 3. the League being between the English and Scots, and resolved they were, and that the League remained.

XXIII. The

Soluti fœderis culpam sustinent, non qui deserti ad alios se conferunt, sed qui quamjurati promiserant oppem re non præstant. Alibi apud eundem, si velint illum in dictis pars alterutra transgredere, rupta fore pacta, Thucyd. lib. 1. 19 E. 4. Vide Stat. 2 H. 5. c. 6. Hil. 14. Eliz. in the Duke of Norfolk's Case. 4 Inst. fol. 152.

In fidelitate
feudali dicitur;
Et si scivero
vult et aliquem
juste offendere,
Et generaliter
vel specialiter
fuero requisitus,
meum tibi, sicut
potero, prestabo
auxilium. Orat.
Demosthen. de
Megalopoli.

* Nihil interce-
di, quo minus
Samniti populo
pacis belique
liberum arbitri-
um sit Liv. l. 8.
Grotius de Jure
belli ac Pacis
lib. 2. cap. 15.
§. 13. Vide
Monmouth Hi-
story of France
fol. 31.

Equals cannot
directly re-
fuse War, nor
demand
Peace.

Liv. 3. Polybius
in excerptis Le-
gationum 35.

When Edward
the Fourth
was chased
out of the
Kingdom,
and Henry the
Sixth was set

XXIII. The Succours that one *Confederate* must afford another *Confederate* (according to the *Law of Leagues*) against a *Confederate*, is of great Consequence: Three Princes Allied, the one makes War against the other, and demands succours from the third; in this case if the Treaties of Alliance be only for *Friendship*, it is certain he is not bound to give any succours: But if the Treaty carries an *Offensive League*, he must succour the most an-
cient allied by a precedent Alliance. If the precedent Allian-
ces have been made both at one time, he must succour him that is allied in an *Offensive* and *Defensive League*: but if the League be *Offensive* and *Defensive* of either side, he ought not to succour either; but he may mediate a * Peace, and cause the difference to be judged by the *Common Allies*, which being propounded with a Declaration, that if one refuse, or having once submitted, will not yield to Judgment, he will succour the other, as the *Swede* and *Swiss*, upon several occasions have done; notwithstanding in point of State on such occasions they usually balance their Estate, and looking more to safety than Justice, they succour him who being enforced, may weaken the powerful, who is more to be feared; yet to unjust Wars there is no obligation; then certainly he ought to be preferred, who hath a just cause of War.

XXIV. By the *Laws of Alliances* Princes may aid particular and common *Allies*, if they be wronged by one of the *Allies*.

But he which is not comprehended in the Treaty of Alliance, cannot be defended against him that is allied without breach of the Alliance; therefore Mediation in such cases is the only hopes of the oppressed, which not having its effect, if the oppressed put themselves into the protection of the Mediator, they then become in the nature of his Subjects, and then that Prince is obliged to their succour and defence, even against his *Allies*, and this is by natural Right.

XXV. By the *Laws of Leagues*, though the Oath binds only the Person, yet the Promise binds the Successor; for though some do hold, that Leagues do depend upon the Oath as their Firmament, though that is not so for the most part, yet the efficacy of such Leagues rests in the promise

promise it self, to which for Religion sake the Oath is added. Hence it is, that Promises made to a Free people are in their nature real, because the Subject is a permanent matter; although the State or Republick be changed into a Monarchy, yet the League remains, for that the body, i. e. the power is still the same, though the Head be changed. And the Person is inserted into the agreement, not that the agreement may be personal, but to shew with whom it is made; for if it be inserted into the League that it shall be perpetual, or that it is made for the good of the Kingdom, or with the Person and his Successors, or for a time limited, the same does most apparently demonstrate the thing to be real.

up again; yet by Reason there was inserted into the same these words, With the King and Realm, that the League did remain perpetual. Phil. Comines. lib. 3. cap. 6. Ulpian. Leg. Jure Gentium, sect. pactum. D. pactis. Adde

que Helvetiis causantur post mortem Hen. 3. apud Thuanum, lib. 97. in An. 1589. Vide & insignem locum apud Cambden. in Anno 1572. ubi de Fœdere antiquo Gall. & Scot.

However, in all Leagues which tend to Peace, though there may remain somewhat, whereby words of ambiguity may arise; yet the most pious way of interpreting, hath been to account the same rather real, than personal; for all Leagues made for Peace or Commerce, admit of a favourable construction, Leagues defensive have more of favour, offensive of burthen.

XXVI. Leagues made with Princes, although they happen afterwards to be driven out of their Kingdoms by their Subjects, yet the League remains firm and good; for the Right of the Kingdom remains with such an unfortunate Prince, notwithstanding he hath lost his Kingdom: The President, Canon, and Plenipotentiary for the Duke of Lorraine at the Treaty of Nimmegen, renewed his instances with the French Ambassadors, that he might obtain some moderation of the Conditions that had been stipulated for his Master; the Emperor did the like, but without success; however the Duke would not neglect any thing that might give the French King fresh Evidences of his desire to merit the Favour of his Majesty, he got Sir Leoline Jenkins, and the rest of the Mediators, to declare to Monsieur Colbert, that the Emperor had taken into his Service all the Lorraine Forces; and in the publick Declaration which the Duke made at Nimmegen, he said,

Quintus said to Nabis, We have made no Friendship nor Society with thee, but with Pelops the just and lawful King of the Lacedæmonians.

said, That he had delivered all his Forces to a Prince at Peace with France, that he might make it appear to the King, that though he was expelled his own Dominion, yet he would do nothing that might give his Majesty ground to deprive him of the honour of his favour: And notwithstanding all these most submissive offers, this Unfortunate but Gallant Prince was shut out of that famous Treaty, which put an end to a War wherein almost all the Princes of Europe were engaged. On the other hand, Leagues made with the Invader cannot be good; for his cause being unjust, is odious: but if * the People will make him King *de facto*, and invest him, the question is then out of all controversie; for then he is become a King *regnant*, and by the Laws of England, if Treason be committed against his Person, and † after he is beaten out, and the King *de Jure* comes to his Crown, the King *de Jure* may punish those Traytors with death.

* 11 H. 7. c. 1.

† 4 E. 4. 1.
9 E. 4. 12.
3. Inst. fol. 7.

Ed. 4. in An.
1470.

Phil. Comines
l. 3. c. 6.

*Reges qui reg-
nis exuti sunt
cum aliis regni
bonis etiam jus
legandi perdi-
derunt.*

The Earl of *Warwick* having raised an Army in France and Flanders, invaded England, and within five or six days after his landing, King *Edward's* Forces betraying him, the Earl became Master of the Realm; the King flying for protection to his Kinsman the Duke of *Burgundy*, he kindly in his misfortunes entertained him; yet while he was in this banished estate, the Duke of *Burgundy* renewed the League with the *English*, it being agreed, that notwithstanding King *Edward's* misfortune, the League remained firm and inviolable between the Duke *Charles of Burgundy*, and the King and Realm of England: So that for *Edward* they should name *Henry* (who was newly taken out of the Tower by the Earl of *Warwick*, at his chasing out of King *Edward*.) Now the true reason that Leagues remain, and are firm, notwithstanding such a change, is, because there goes along with them a tacit condition, *viz.* of holding their possessions; and therefore the World wondred not, that His late Sacred Majesty having sworn a League with the King of *Spain*, expressly as he was King of *Portugal*, did notwithstanding receive two Ambassadors from the then new King of *Portugal*; and that without being judged either in England or *Spain* to have broken his former Oath and League.

The

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The Duke of *Guise* having formed the League against *Henry* the Third, which was, in regard the King was so cold in the Profession of the *Romish Faith*, that it was in danger to be extinguish'd by the increase which he permitted of the *Reformed Religion*, especially seeing *Henry* the fourth then King of *Navarre*, was of that Religion, and was to succeed to the Crown; wherefore by the Mediation of *Philip* the Second of *Spain*, the Pope qualified the Duke of *Guise*, Head of that *Catholick League*, and (which in point of Government was to set him above the King) avowed him *Protector* of the *Catholick Faith* in the Kingdom of *France*. When *Henry* the Fourth succeeded to the Crown, then this League for security of Religion was most violent, and the *Spaniards* without, hoped, by nourishing thus the *division* within, to carry all for himself at last. To avoid which gin, and to answer all, the King changed his Religion, and negotiated by *d'Ossat*, to be received by the Pope as a dutiful Son of the *Church of Rome*, demanding absolution for what was past, and making large promises of due obedience for the time to come. The King of *Spain's* interest was, that he should not be received, and thereupon he endeavoured to persuade the Pope, that King *Henry* did but dissemble with him, and that under this Disguise he would easiliest ruine the *Romish Religion*: Notwithstanding this the Cardinal obtained his Reception, Absolution, and Benediction, through the many Promises and Presents which he made to *His Holiness*; whereupon the *Spaniard's* Designs were in a Moment all blown over from *France*, but fell heavily upon the *United Provinces*, which were sorely oppress'd, for that they apprehended the Loss and Ruine of their Country; and thereupon they implored Assistance from King *Henry*, who received their Ambassadors very Graciously, and gave them Assurance of Relief. The King of *Spain*, who wanted no good Intelligence in the Court of *France*, immediately remonstrated to the Pope, That his former Intimations concerning *Henry's* Dissimulations, did now appear in the Face of all the World; and that seeing *His Holiness* had been so Credulous, he knew not now whether they should be able to save the *Catholick Faith* from being subjected to the *Reformed Religion* or no: for whereas the *Hollanders* had revolted from him, only because he resolved to use the

*Peter Mar-
tens History
of France in
the Life of
Henry III.*

true

true Means for the Establishment of the *Romish Faith* among them; and that now he was in a fair way of reducing them (which conduced so much (by *His Holiness* his Opinion) to the Establishment of the *Romish Faith*) *Henry* had taken their Party against him in that Work; and that at *Paris* he had received their Ambassadors to that Purpose, although he knew they were his lawful Subjects, &c.

This startled the *Pope* not a little, who charged d'Offat for having betrayed him, and put the Church in Danger. This Argument was as subtil on the *Spaniards* side, as changing Religion was on King *Henry's*; and therefore the *Cardinal* was not a little perplext how to answer it to the Advantage of his Master; as also coherently to the Considerations of his former Reception into the Church: But at last he replied, That *His Holiness* needed not wonder how in reason of State, those different Religions might joyn together for political Ends, without Hazard of altering Religion. Thus *David* sought Protection of the *Philistines*, and *Abraham* redeemed the sinful *Sodomites*. That he took it to be upon the same Ground, that *His Holiness* himself, not long before, received a *Persian Ambassador*, who was so far from being an Heretick, that he never pretended to the Name of Christian: That it was a plausible Argument which the King of *Spain* used, in complaining of *Henry's* receiving and avowing their Ambassador, especially knowing at the same time that they were Rebels, and could pretend no Right or Title separate from his Crown: For Princes (quoth he) when Ambassadors are addrest to them, never inform themselves of the Rights and Title of those Princes from whom they are sent; but whether they have Possession of the Force and Power of those Places from whence the Ambassadors are employed; for it would be an endless Task, and require an infallible true History of the World (which is not to be made by Man) if all the Ambassadors, before their Reception, should be obliged, first to prove clearly to the World, the just Right by which their Masters derive those Titles and Jurisdictions which they assume to themselves.

XXVII. And as Leagues are Covenants or Agreements made by Command of the highest Powers, wherein the

Parties

*Vide Peter
Matthew's History of
France in Vita
Hen. 4. In
Regno diviso
gens una, pro
tempore quasi
duae gentes habentur: And
Princes are to
have an Eye
to the Power
which each
Kingdom
hath to afford
Benefit one
to the other,
and not to
examine their
Titles.*

Parties are bound over to the Divine Wrath, in case they break their Faith; it hath been a famous question, Whether they may be entred into with those that are Aliens from the true Religion, whereof by the Law of Nature there is no doubt nor difficulty; for that Law is so common to all Men, that it admits not any difference of Religion; but the question is about the Law Divine, out of which it hath been discussed, not only by Divines, but famous Laywers, as *Oldradus*, *Decianus*, *Grotius*; upon the whole they have agreed, that they may be entred into as well with Princes Idfidels as Christians: and that is evidently proved; for that before the Law of *Moses* it was lawful to contract Leagues with Aliens from Religion for an in-offensive and harmless behaviour, as that of *Jacob* with *Laban*: nor did the Law of *Moses* make any change, the example of the *Egyptians* being exprefs in the point. 'Tis true those seven Nations and other Kingdoms, as the *Amalekites*, that were destinated by Divine Sentence to be extirpated, were excepted; but Leagues of Commerce, and such as pertain to the utility of both Nations, or of either Party, are by the Law permitted with the profane: So *David* and *Solomon* made League with *Hiram* King of the *Tyrians*; and that which is very observable in the Sacred History, of that Action it is said, That the Alliance was made by *Solomon* according to the Wisdom which God had given him. 'Tis very true, the *Jews* were generally very cautious of contracting with Idolatrous Princes, and the Reason was, for that they had exprefs Promises of Victory, but that was conditionally, i. e. if they kept the Law, which if perform'd, they had the less need of human Aid. But now under the Gospel such Contracts have a more favourable Admittance, according to that of *Tertullian*: So long as *Israel* only was his people, God did justly command mercy towards their Brethren alone; but after that he gave unto *Christ* the Nations for his Inheritance, and the Ends of the Earth for his possession; and that began to be paid which was promised in *Hosea*, They that werere not my people shall be my people, and the Nations that had not obtain'd mercy shall obtain mercy; from that time *Christ* hath extended unto all the Law of Fraternal Benignity, excluding none from our compassion no more than from his Vocation; and therefore as it is no evil to do good to the prophane, so neither is it

Coke 3. Instit. fol. 155.

Grot. Lib. 2. cap. 15. §. 8; 9, 10.

Lib. 7. cap. 3. Horum exemplum secuti Imperatores & Reges Christiani, aut cum non sanctis Christianis fecere, Con-

Gothis & Van unlawful to implore their help, as *Paul* invoked the Aid
alis, Jusli- of *Cæsar* and the Chief Captain; so that at this day there
nianus cum is no intrinsecal or universal Pravity; nevertheless
Longobardis, those Alliances have their Circumstances or Rules of Go-
cum Saracenis vernment, as not to joyn with them but in extreme ne-
Theodosius, Ho- cessity, according to that of * *Thucydides*: They that are
norius, & cum treacherously assaulted, as we are by the Athenians, are not
Mauris Reges to be blamed, if they seek for safety, and secure themselves by the
Hispania, cum aid not of Greeks only, but Barbarians.
Tartaris Ro-
dolphus Hob-
spurgensis, Adi

Johannem de Carthagena l. 3. de Jure Belli Romani Pontificis c. 1. Julius secundus Pon-
tifex Turcis usus, Vide Bultrod. part. 3. fol. 28. cited in Marshe's Case, the Case of
Samuel Pellagry that had been Ambassador to the States of Holland to treat with
 them from the Emperor of Morocco.

* Famous was the Piety of *Emanuel Duke of Savoy*, who when he was able to take
Cyprus by the aid of the Great Turk, refused it.

C. H A P.

CHAP. VIII.

Of Alliances unequal, and of Protection.

- I. Of Alliances unequal, in reference to the acknowledging a Superiority or Protection in another.
- II. Of Protections by a Prince or State voluntary or mercenary.
- III. Of the Conveniences of such Alliances, how considered.
- IV. Of the Duty incumbent on the protected, and the obligation in honour and Justice on the Protector.
- V. Of Alliances unequal, and of the ordinary Causes that may tend to a Rupture of the same.
- VI. Of the Causes extraordinary that may occasion the Breach of such Alliances.
- VII. Of Faith and Assurance implicitly discharged by the delivering of Hostages.
- VIII. Of the differences of Leagues contracted by Princes, through force or fear, differing from Contracts private.
- IX. Of Ambiguity in words, how it hath given occasion to Princes to depart from the League, and of the Reputation of Princes on such occasion preserving the Alliance.
- X. Of the firmness and assurance of Alliances, whether to be found more in Princes, or in Republicks.
- XI. If one Party hath violated the League, whether it be lawful for the other to depart from the same.
- XII. In the construction of Leagues, the Thoughts not the Words of Princes to be considered.
- XIII. Of things tacitly excepted in all Leagues and Treaties, in reference to their nullity.
- XIV. Of things favourable, things odious, and others of a mixt nature to be used in the interpreting of Leagues.

I. **U**Nequal Alliance is that which is contracted betwixt Princes or States unequal in Honour, or in Power, with unequal Conditions, the acknowledging the other, not for Master or Lord, but by Honour as the more powerful, and the better qualified, and some for Protector; and these Treaties are made with those States, which take or give Pension, or which put themselves in to Protection. And such was the League of * Protection propounded to Queen Elizabeth by the States General of the United Provinces, who by Joos Van Menin most humbly besought Her to accept of the Sovereignty and Supream Dominion over the said United Provinces upon certain and reasonable Conditions and Articles, &c.

Andronicus; Rhodius post Aristotelem, amicitia interpretatur, hoc autem proprium, ut potentiori plus honoris, inferiori plus auxilii deferatur, in Grot. lib. 1. c. 2. §. 24. n. 2. It is the property of Friendship betwixt unequals, that the

stronger have more Honour, and the weaker have mere Help : *Proculus* adds that such a Clause is inserted in the League, to signifie the one is superior in Authority and Dignity, for both are free, but are *sub patrocinio; non sub dictione*. *Liv. lib. 37. Cicero Offic. 2.*

* *Non sine metu in posterum, quem tunc præsens necessitas averterat. Grotius Annal. lib. 5. A. E. Mitoran. lib. 13. ad An. 1585. Grimston, lib. 12. ad An. 1585.*

Tribute is paid by the Subject, or by him, who, to enjoy his liberty, pays that which is agreed upon to him that hath forc'd him to do it. But a *Pension* is held voluntary from him that is in *Protection*, or from him that is in all other things equal to the *Treaty of Alliance* to hinder the *Pensioners*, that he joyn not with the Enemy, as the *Swiss* to the *French*, or to have Aid and Succours from him.

*Leg. non dubit
D. de Cap.*

II. But that *Protection* is most true and Honourable, when a Prince or Republick takes upon him the defence of another, *freely without Reward*, though some, if not all, find it most necessary to ballance Honour with Profit, from this Maxim, that *A pecuniary interest obliges more to succour, than when barely obliged by Oath.*

III. Again there seems to be a kind of *Protection* or an Alliance, which indeed is no more than a bare pecuniary retaining. Politicians have considered the Subject diversly, either Absolute or Conditional ; Absolute is that which is measured by the concurrence of the greatness of Forces, Treasure, Munitions, and other Military Preparations : Conditional is that, the which although it be less than an absolute, yet is more fit to succour us or do us Harm : in this the Neighbourhood is of very great consideration ; for that a Neighbour Prince of mean Forces may more easily hurt or succour us, than a great Prince that lies far off ; near Succours are always sooner ready and with less Charge. And this makes the Bishop of *Munster* to be in that esteem with the *States of Holland* and the other Sovereign Princes bordering on his Territory ; and the Reason why he is so much the more courted into Assistance and Friendship is, for that his Forces being at hand, if Peace be concluded, he is the more easily dispatched, whereas remote and absolute Princes their succours come often too late after the Occasions to defend us, and too soon to oppress us.

IV. By

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IV. By the Law of *Protection*, he that is protected owes all *Respect* and *Honour* to his *Protector*, against whom if he conspire or attempt, or strays from his duty, it is lawful for the *Protector* to make *better assurance*; nay, if he pleases, to make himself *Master*: But then on the other side, the *Protector* ought to defend and succour the protected, and use him well; for otherwise he may withdraw himself from the *Protection*, and seek another.

The Genoeses having put themselves in the protection of the French King, revolted; he thereupon changed their Conditions into Privileges,

ges, to the end it might be his Will to deprive them when he should think fit. *Vide Cardinal. Thusc. P. P. Concl. 935.*

V. In Alliances that are unequal, there are four kinds of Controversies may happen.

First, If the Subjects of a Prince or Republick, that is under the *Protection* of another have committed any thing *against the League*.

This holds as well between Leagues equal as unequal.

Secondly, if the Prince or Republick be accused.

Grotius de Jure Belli ac Pacis

Thirdly, If the Fellows, which are under the *protection* of the same *Prince* or *Republick*, contend with one another.

l. 1. c. 3. §. 21. This hath the same Right in Leagues that are equal:

Fourthly, If the Subjects complain of their own Ruler.

Nam ut quis ultionem sumat ab eo qui peccavit, satis est ut ipse ei qui peccavit subditus non sit. Grot. de Jure Belli.

To the first, if a Fault appears, the Prince or Republick is bound either to punish the Offender, or to render him unto the Party injured, and see or endeavour that Damages may be recovered.

But one of the *Associates* in the League hath no Right to apprehend or punish the Subjects of his Confederate.

To the second, the *Confederate* hath a Right to compel his Confederate to stand to the League, and if he will not, to punish him, for that one may take satisfaction or revenge of him that hath offended; and this happens as well amongst those that have no Confederation at all.

l. 1. c. 3. §. 21. n. 5.

But that proves not any power of commanding, for Princes

To the Third, as in Confederacies equal, the Controversies are wont generally to be brought before an *Assembly* of the Confederates, that is to say, such as are not concerned in the Question, or else before *Arbitrators*, or else before the *Prince* of the *Association*, as a Common Arbitrator.

do usually try their causes before Judges of their own choosing *Ead. l. 1. c. 3. §. 8.*

n. 6. Dofft.

Eos qui Fœ-
deris Princi-
pes sunt; circa
sua quidem
utilitates nihil
præcipuum su-
mere; ut in
communibus
rebus curandis
eminere supra
ceteros In-
Orat. Corin-
thiorum.

So on the other hand in a *League unequal*, it is agreed for the most part, that the Controversies be debated before him who is *Superiour in the League*.

To the last, the *Confederates* have no *Cognizance*. In common Affairs out of time of Assembly, even where the *League* is equal, the Custom is for him who is chose *Chief of the League*, to have Command over the *Confederates*, according to the Speech of the *Corinthians* in *Thucydides*, *It becomes them that are Princes of the League, not to seek their own particular advantage, but to content themselves with an Eminency above the rest, in taking care of the common Interest.*

Oldrad Conf. 1.

Gregorius,
Perjuriū Deo
culpam impin-
git negligentia.

VI. Though that the Breach of Faith be much practised in such Affairs, yet there are few Princes found, which have not found a pretext: some have pretended to be circumvented by error; others by Change of Affairs have pleaded an excuse, as great Wrongs or inevitable Loss, and apparent danger of the ruin of their *States*, which are the causes, wherein some say, that an *Oath* is not obligatory; the Condition, by reason of the Oath, being impossible or unjust; to these Limitations, some hold they must not keep faith with an *Enemy of the Faith*, nor with him that hath broken his, nor with a Subject, nor with a *Thief* or *Pirate*; certainly if it be not lawful for a Man in these cases to keep *Faith*, it is not lawful to give it: If it be lawful to capitulate with such Men, it is necessary to hold what we promise, that is, (we presume) when the word is given by him that may give it, and that they rely upon it.

VII. If *Hostages* are taken, he that gives them is freed from his *Faith*; for that in receiving *Hostages*, he that receives them hath relinquished from the assurance which he hath in the *Faith* of him that gave them; so where a *Captain* for his *Prince* gives his Word without *Commission* it binds not the *Prince*.

VIII. Some Lawyers would judge of *Treaties* as particular *Contracts*, by which means they would stretch the Consciences of *Princes*; for, say they, that as a private Man is not bound by that which he hath promised by force or fear, so it ought to take place amongst *Princes* and in *Treaties* which are made betwixt *Sovereigns*; but that is ridiculous, for that were in effect to banish *Faith* from all publick

publick Negotiations; for there is no Treaty but what is usually made in *Arms* by force, or through fear to lose either Life, or Goods, or Liberty, or the State; which are causes of just fear, and may shake the most constant.

IX. Some Princes desirous to shew themselves more irreligious in these Ruptures, have taken subject and occasion upon the Ambiguity of some Clauses in the Treaty, or upon the Equivocation, as Charles the Fifth did; or else they seek other Occasions, as attempting against those whom their Allie is bound to defend, to the end that drawing him into the field, he may lay the cause of the Rupture on him. Upon the words Eving and Ewig, to retain the Landgrave of Hesse.

But Princes, who Respect such Treaties with a pious Intention of preserving them, always remain constant and firm; and though occasion may offer it self, by which they might get advantage by the Breach; yet when they remain durable, such respect is afterwards had to their Word and Honour, that fewer and lesser securities will be demanded of them, than one whose Faith is doubted.

X. But Assurances in cases of this Nature have been found more in Republicks than in Princes; for though Republicks have the same mind, and the same intentions as Princes, yet for that they move but slowly, it will cause them to stay longer in resolving. Famous is that of the Answer of the Athenians, when Themistocles in his Oration told them, That he could discover a Matter in which the Athenians would reap great Advantages, but he could not tell it, for fear the Discovery would take away the Opportunity of achieving it: whereupon the Athenians deputed Aristides, to whom he should communicate the Secret, and with him should consult about the obtaining it: They meeting, Themistocles demonstrated that it was in the Power of the Athenians to make themselves Masters of all Greece, for the Grecian Naval Army was then in their Ports and Protection; whereupon Aristides replied, The same was a Breach of Faith: But it was answered, It being for the publick, all considerations of that kind ought to be laid aside; whereupon Aristides being called by the People to give Report, told them, Themistocles's advice was exceeding profitable, but dishonest, for which cause the People wholly refused it. Famous was the Answer of the Carthaginian Senate to the Romans upon the faulting of Saguntum: Ego non privato publico consilio Saguntum oppugnatum, cenfeo; sed utrum jure an injuria; nostra enim hac quaestio atq; animo adverso in Civem nostrum; est nostrum an suo fecerit arbitrio, vobiscum

una disputatio est, licueritne per fœdus fieri: Whether *Saguntum* was assaulted by private or publick Councel; we conceive it not to be made the question; but this, Whether it was assaulted justly or unjustly; for to our selves an account is to be given by our Citizens, whether it did it of it self, or by Commission; with you alone this is disputable, whether it were a violation of the League, or no. *Livius lib. 31.*

XI. If one party has violated the League, the other may most certainly depart from it; for the Transgression of the Articles, be it never so little, makes a Breach of the Agreement, unless it be otherwise prevented by

* *Grot. de Jure Belli ac Pacis*, that for every offence it may not be lawful to depart from the 1. 2 c 15 s. 15. League.

In fide quid sentis, non quid dixeris cogitandum. Cic. de Offic. 1.

XII. In all Leagues, the Thoughts of Princes and States are to be considered, not what they said; yet because internal acts are not visible by themselves, it is necessary that somewhat certain should be determined, *i. e.* reduc'd to Heads or Writings, otherwise there would be no Obligation at all, for then every one might free himself by affixing on his own Words what Sense he pleases. Hence it is, that by the dictates of *Natural Reason*, he, to whom any thing is promised, hath a Right to compel the Promiser to that which right Interpretation suggesteth, for otherwise the matter would have no end. And as the reducing of the Treaties into Writing makes the Agreements plain and obvious, so the mutual advance of the Ministers proportionably hastens the Accomplishment. The Counts *Avaux* and *Servient*, being appointed for the Treaty at *Munster*, as they passed through *Holland*, they entred into a Confederacy with those States, wherein each Party reciprocally did bind themselves by Articles, not only not to treat of any thing without the Assent and Participation of the other Collegue, but that the Treaty should be carried on so equally, as if one of the Parties should see the other's Business advance further than his, it should be lawful for the one to desire the other to proceed no further, till his Affairs were equally advanced: which Articles bounding the Approaches of each other, soon hastened the end of that tedious Treaty.

Storrmouth's History of France fol. 28.

XIII. Again,

XIII. Again, in all Leagues and Treaties for Peace, there is this Exception to be supposed in the Contractors, unless some new Cause intervene, or unless it be by the default of him with whom the League and Compact is made, or Affairs continuing in the same posture and state in which they were at the time of the Contract: and that Saying of *Ulpianus* and *Pomponius* concerning private Compacts, viz. *That an Agreement is not violated from which a Man recedes upon a just reason and motive*; is by Interpreters extended to National Leagues betwixt Princes and States.

Qui promittit non offendere, is subintelligit exceptionem — Nisi causa superveniat, nisi culpa accesserit ejus cui promissio ista fit, & pactio fœderis, rebus sic stantibus. Alber. Gentil. de Jure Belli, l. 3. c. 24.

XIV. In the Interpretation of Leagues and Truces, there ought be a very great Care had, in regard of the Sincerity of them; therefore in things promised or secured by such Leagues, some are favourable, some odious, some mixt, or of a middle nature. Those that are most favourable, are those whose Words tend to Peace, not to War, whose Footsteps leave ever behind the deep Impressions of Misery, Devastation, and Poverty, but more especially when such Leagues are made for *War Defensive* than otherwise; but those are called *odious*, which burden or oppress one part only, or one more than the other, and likewise such as tend to matter of *Revenge* or *Punishment*, or to violate some former acts, or obligations, or the bringing in a change or innovation of what hath been constantly settled, and used before. Mixt, as where a Change is propounded; but that is with the Sisters of *Moderation* and *Peace*, which are proportionably good, according as the Change may be esteemed. — Therefore the Standard Rule is, *That in Leagues and Treaties not odious, the words are to be taken according to the full extent and propriety of popular use; and if there be more Significations, the largest is best*: On the other hand we are not to recur to Significations plainly improper, unless otherwise some absurdity or inutility of the Agreement would follow. Again, Words are to be taken ever more strictly than propriety suffers, if it be necessary for the avoiding of *inequity* or *absurdity*. But if there be not such necessity, *manifest equity* or *utility* in the Restriction, we are to stay them within the narrowest Bounds of Propriety, unless the Circumstances dissuade. On the other hand in *Leagues* or *Promises odious*, even a figurative Speech is admitted to avoid the

In L. non possumus. D. de Legibus.

Vide exemplum in L. cum visum. C. de fidei commissis.

Grotius lib. 1.
cap. 16. §. 12.

the Odium, or burden, therefore in Donation, Remission of ones Right, Dominion, or Property, they are always to be construed to those things which were probably thought on, and really intended. So Aids and Succours promised from one part only, is to be understood to be due at the charges of him who shall acquire them.

C H A P. IX.

Of Treaties of Truce, Neutrality, and Peace.

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| <p>I. Of Treaties, the various sorts. II. Of Rules in Cases doubtful. III. Of Truces amounting to a Peace. IV. Of the Advantages between Treaties of Truce and Peace. V. When promoted. VI. Whether it can prejudice the Pretensions of the Principal.</p> | <p>VII. How preserved and punished by the Laws of England. VIII. Of Treaties of Neutrality, the various sorts. IX. Of the Advantages of the same. X. In cases of necessity where he ought to declare, and for whom.</p> |
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Treaties are either with *Enemies* or *Friends*, or with Persons which desire to continue *Neuters* with us, or we with them.

The Treaties which are made with our *Enemies* are either for a time, or perpetual.

Perpetual, as the Peace that is made to compose all differences, and the War that is undertaken for Conquest, or for Reparation of Injuries, or to restore the Commerce.

Treaties, which are made for a time with our *Enemies*, are called *Truces*; the which are either *general*, for all the States of the one or the other Prince, for all Persons, and for all sorts of Commerce; Or else they are *particular*, for certain Places, for certain Persons, and for the Commerce, and sometimes no further than a bare suspension of Arms.

Truce, what it is.

A Truce is an Agreement, whereby tho' the War continue, yet all Acts of Hostility do for a while cease, for between War and Peace there is no Medium, it is and may be called a War, tho' at present its Operations are intermitted. An Habit may be tho' at present it doth not operate. A Man may be said to be Wise or

or prudent, tho' he be asleep, and vertuous, tho' for a while he be void of Action. So that a Truce cannot be called a Peace, for tho' the Fight cease, the War continues, 'tis but a bare Suspension of the Acts of War.

Grot. de Jure Belli & pacis. lib. 3. c. 21. §. 1.

II. When any one is bound by Alliance not to make Peace or Truce, without the Consent of his Allie, and whose Agreement seems doubtful, they add in the Treaty, that it shall take place for all those the Contractors shall Name, and they set down no perfix'd time, but that it shall continue till he refuse, and some reasonable time ascertained after; as that which was made betwixt Charles the Eighth and the King of Spain.

In the Truce that was made between Edw. the 4th and Lewis the Eleventh, there was like provision made

for Charles Duke of Burgundy, but he refused, and concluded a Peace for himself apart, being angry with Edward the Fourth for making the same. *Phil. Comin. lib. 4. cap. 40.* So Lewis the Eleventh concluded a Truce for Nine Years with Edward the Fourth when he had invaded France. *Phil. Comin. lib. 4. cap. 8.*

III. Sometimes a general Truce holds the place of Peace, as that of a hundred years. Such Truces are commonly made betwixt Princes that are equal in Power, as that betwixt Spain and Portugal, and will not quit any thing of their Rights by Peace; and yet desire to live quietly in the State wherein they are, satisfying by this Medium the point of Honour.

IV. Treaties of Truce are many times less subject to Rupture than a Peace, which is made perpetual; for Princes or States that find themselves aggrieved with a Treaty that is perpetual, seek out plausible Reasons to forsake it, seeing the Grievances cannot be otherwise repaired; but if the time be limited and expired, they may pursue that which they think ought to be granted, and the other may oppose; and if they have a desire to continue the Truce, there is nothing so easie as to renew it. Hence it is become a Maxime in State, That seeing Treaties are grounded on the Interests of Princes which change with the time, it is necessary to change and settle them at the end of the time, or to break them off: for it is in vain to trust to a bare Friendship.

V. A Truce is likewise made to advance a Peace, and to 'Tis true, the treat of it; and such was the Truce of the Hollanders proposed at the Treaty of Munster, who refused absolutely to

Swedes and the other Confederates with

France were for a Peace, and the Marquis Castel Rodrigo then offered a Blank unto the *Hollanders* which they might treat of at home.

* *Monmouth's History of France*, fol. 28.

* For the Right remains with him, however he hath lost the possession.
Grot. d. Jur. Bell. ac Pacis, lib. 2. cap. 16. §. 18.

2 *H. 5. cap. 6.*

* 20 *H. 6. cap. 11.*

† And at the request of the Lords and Commons was pardoned, he making satisfaction for the loss. 11 *H. 4. ad Parliam. tent. quinden.*

Hill Vide Cottin Abridgment.

10 *E. 4. 6. B.*

15 *H. 6. c. 3.*

18 *H. 6. c. 8.*

20 *H. 6. cap. 1.*

14 *E. 4. c. 4.*

to listen to any more than a Truce, and the Reason that they then gave was, that their Commonwealth was to be maintained by Arms, and that by admitting a Peace, the same might be a means to reduce it to weakness, which would in the end tend to the destruction of that State; nay, they offered the Truce on Terms, that if * *France* should enter thereinto, she should oblige her self upon any Breach to reassume War, and that Treaty of Truce was continued, which not long after was converted into a perpetual Peace.

Again, *Truces* are sometimes promoted for the more honest discharge of a *League*, which is made with some other Prince, whom they have accustomed to comprehend therein: so as a Peace following it, or a Truce not being accepted by him, they take occasion to leave the *League*, it being not his fault that leaves it, that the War was not ended.

VI. And although it seems that a *Truce* cannot by its condition prejudice the *pretension* in the *Principal*; yet it is most certain that if he which is chased out of a contentious State, consents that during the *Truce* the *Commerce* shall be forbidden to his Subjects, he doth wholly stop the gate, as * *Lewis* the Twelfth did in the *Truce* which he made with *Gonsalve* after the Conquest of the Realm of *Naples*.

VII. In *England* by the Statute of 2 *H. 5. cap. 6.* Robbery, Spoiling, breaking of *Truces* and *Safe-Conducts* by any of the King's Liege People and Subjects within *England*, *Ireland*, and *Wales*, or upon the main Sea, was adjudged and determined to be High-Treason, but this branch concerning High-Treason is repeal'd by the Statute of 20 *H. 6. cap. 11.* * 1 *E. 6. c. 12.* 1 *M. Sess. 1. c. 1.* But by the said Act of 2 *H. 5.* for the better observation of *Truces* and *Safe-Conducts*, *Conservator Induciarum & salvorum Regis conductuum*, was raised and appointed in every Port of the Sea by Letters Patents: His Office was to inquire of all Offences done against the King's *Truces* and *Safe-Conducts* upon the main Sea (out of the Counties and out of the Liberties of *Cinque Ports*) as *Admirals* of Custom were used to do. Sir *John Trebiel* was committed to the Tower for taking a *French Ship*, and being brought into Parliament, did there justify the same; but at last confess'd his fault, and begged the King's Pardon †. Generally

rally all Leagues and Safe-Conducts are, or ought to be of Record, that is, they ought to be *Inrolled in the Chancery*, to the end the Subject may know who are in Amity with the King, and who not; who be Enemies and can have no Action here, and who in League, and may have Actions personal here.

Sometimes they have been inrolled in the *Wardrobe*, as 19 E. 4. 6. B. being matters of State.

Note, *In all Treaties, the power of the one party, and the other, ought to be equal; nor are they to be held firm till ratified.*

Before the Statute, when any breach of Truces or Leagues happened, or was occasioned by the misdemeanours of any of the King of England's Subjects, there did usually issue forth Commissions under the *Great Seal of England*, to inquire of the Infringers of the same, and to punish and award Satisfaction to the injured.

Rott. Scotiæ de Anno. 10 E. 3. m. 36 intus, de puniendo illos qui contra formam Treuge hominibus de Scotia concessæ delinquerint.

VIII. Princes who neither love nor hate any thing absolutely, seem generally inclined to *Neutrality*, and in that govern themselves in their Friendships according to their Interests; and *Reason of State*, in effect is no other but *Reason of Interest*.

Neutrality may be of two sorts; the one with *Alliance with either part*, the other *without Alliance*, or so much as the least Tye to the one or other, which is that which properly may be called *Neutrality*.

The first is governed by the *Treaty of Neutrality*, the latter by the *Discretion of the Neuter Prince*, whose *Carriage* ought always to be such, as that he may not give the least glimpse of inclining more to one than to another.

IX. The Advantages of *Neutrality* are, that the Neuter Prince or Republick is honoured and respected of both Parties, and by the fear of his declaring against one of them, he remains Arbitrator of others, and Master of himself.

And as a Neuter neither purchases Friends, nor frees himself from Enemies; so commonly he proves a Prey to the Victor: hence it is held more advantage to bazard in a Conquest with a Companion, than to remain in a State wherein he is in all probability of being ruined by the one or the other.

But

But Princes that are *powerful*, have used generally to preserve a *Neutrality*; for whilst Petty Princes and States ruin themselves by War, he fortifies himself with *means*, and in the end, may make himself Judge of their Differences.

Much practi-
sed by the
Princes of the
Empire and
petty States.

On the other hand it hath been conceived that Republicks that are weak, what part soever they take, it will be dangerous to them, especially if they are in the midst of two more powerful States than themselves; but experience hath made it appear to the contrary, that *Neutrality* is more beneficial to a *weak Prince* or *Republick* so that they that are at War be not barbarous or inhumane. For although a *Neutrality* does not please either Party, yet in effect it wrongs no Man; and as he doth not serve, so he does not hurt: besides his Declaration is reserved till the Issue of the War, by which means he is not obliged, by siding with either party, to gain or lose by the War,

X. But if the Neuter be prest by Necessity to declare himself, he must do it for the *most powerful* of the two Parties, following that *Roman Maxim*, *That either they must make themselves the strongest, or be a Friend to the strongest*: So they of *Strasburg* * declared for the *Empire* against the *French*. On the other hand, if the Neuter sees, that joyn-
ing to the weaker, will balance the Power of the stronger, and by this Counterpoise reduce them to Reason; the same hath been generally followed upon the Maxim, *That the safety of States consists chiefly in an equal counterpoise of the one, and the other*; for as the greatness and opulency of a Prince draws after it the Ruin of their Neighbours, it is wisdom to prevent it.

* Anno 1674.
Consul Quin-
tus ad Achaos,
quod optimum
esse dicant non
interponi vos
bello: imo nihil
tam alienum
rebus vestris
est: Quippe sine
gratia vel dig-
nitate premi-
um victoris eritis.

Lucius lib. 35. Scripta Ammirat. disc. polit. l. 18.

C H A P. X.

Of the Immunities and Privileges of Ambassadors, and other publick Ministers of State.

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| <p>I. Of the Function of Ambassadors and Agents generally considered.</p> <p>II. Of the Difference between Ordinary and Extraordinary.</p> <p>III. Of the Qualifications and Matters requisite to be in such.</p> <p>IV. Whether any but Sovereign Princes and States may qualify such, and who may not.</p> <p>V. Of the Right of Ambassadors, how secured by the Laws Divine, and of Nations.</p> <p>VI. Of Precaution, whether the same may be given to such not to come, and attempting against such: How to be dealt with, and of the punishment of those that shall violate them by the Laws of England.</p> <p>VII. How Princes and States may govern themselves in reference to their Reception or Refusal.</p> <p>VIII. Whether Ambassadors may be subjected to Punishment when they offend against the Laws of Nations.</p> <p>IX. Of proceeding against them by Princes and Republicks at this day, according to the Laws of Nations.</p> <p>X. Whether privileged in that State or Country thro' which they pass without leave; and of the various Proceedings against them by several Princes and States, illustrated in Precedents and Examples.</p> | <p>XI. Of proceeding against them according to the Laws of England.</p> <p>XII. Where they forfeit their Privilege, according to the Laws of England, in things Capital.</p> <p>XIII. Where preserved in Matters ordinary not malum in se.</p> <p>XIV. The Office of a publick Minister, what it includes in Matters Civil for the King and Nation whom they represent.</p> <p>XV. Whether the House of an Ambassador can be a Sanctuary to offenders, or that he may exercise Royal Jurisdiction over his own Domesticks and Vassals.</p> <p>XVI. Whether the Goods of an Ambassador are subject to seizure for debts contracted by himself.</p> <p>XVII. Outrages committed by Ambassadors, where a Forfeiture of their privilege.</p> <p>XVIII. Of punishment on those that shall offer Violence to their persons.</p> <p>XIX. Observations touching the Immunities and Governments of the publick Ministers of Venice.</p> <p>XX. How introduced by the Laws of Nations.</p> <p>XXI. Wars whether just for Violation done to publick Ministers.</p> |
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I. AN Ambassador and Agent is the same thing, if Coke 4. Instit. we consider only the Function of their Charges: fol. 153. Agents are only in this they differ; an Agent hath charge to represent Agents are sent

generally used when there is some Suspicion sent the *Affairs* only ; but an *Ambassadour* ought to represent the *Greatness* of his *Master*, and his *Affairs*.

that the *Ambassadour* will not be honoured as he should be ; therefore the *French* Kings of late Years have no *Ambassadors* in the *Emperor's* Court, but *Agents*, because of the Competition for Precedence betwixt him and *Spain*.

II. *Ambassadors* are in two Capacities, either Ordinary or Extraordinary : The Ordinary or *Liege Ambassadors*, are those who are commanded to reside in the Place whither sent, unless they receive Letters of Revocation ; and as the time of their Return is indefinite, so their Business is uncertain, arising out of emergent Occasions, and commonly the Protection and Affairs of the Merchants, is their greatest Care. The Extraordinary or *pro tempore* are those that are employed upon some particular great Affairs, or Condolements, or Congratulations, or for Overtures of Marriage, &c. Their Equipage is generally very Magnificent and Illustrious, and they may return without requesting of Leave, unless there be a restraining Clause in their Commission.

III. An Ambassador or Agent ought to be conversant in all sorts of History, reading with Judgment, and weighing all the Circumstances of Action which are there represented, by which he will be qualified to know (but especially of that Country whither he is sent)

1. The Establishment of Estates.
2. The Rights of Limits.
3. The Genealogies of Princes.
4. The Pretensions of Kings upon the Estates of others.
5. Their Forces, Means, Alliances, and manner of living. Personally he must be
 1. Resolute and Courageous in that which he hath wisely deliberated.
 2. Secret in Affairs of Importance.
 3. Discreet in his Speech.
 4. No Detractor or Evil Speaker of any King or State, but more especially of him or them with whom he remains.

5. One that will speak freely of his Master's Pretensions, if there be a Question to maintain them.

IV. By the Laws of Nations, none under the Degree of a Sovereign Prince can nominate or send any in that Quality; nor can any Subject send or receive any Ambassador, be he never so Great; if a Viceroy doth it, it is no less than High Treason; and so it was declared when the Scots, *inconsulta Principe*, sent Lowden and others in Quality of private clancular Commissioners, to treat with the French King Lewis the Thirteenth, in the Name of the whole Nation for Assistance, the King would not admit or hear them. So did Queen Elizabeth when Christopher Assonville came into England in Quality of a Minister of State, sent from the Duke of Alva then Governour of Flanders, she refused to admit him, he not having any Commission or Credentials from the King of Spain. 'Tis true, the Electors and Princes of Germany have obtained the Privilege of sending, and the Reception of Ambassadors, * but that is limited only to Matters touching their own Territories, and not the State of the Empire. And so likewise the Hans Towns may do the same; for they claim the like Privilege, they being free Imperial Cities, and partake of the same Regalia's, either by Prescription or by Grants from former Emperours, whose Necessities enforced them to part with such Royal Flowers of the Empire; and generally they † send for their Ambassadors always two Persons, one of great Birth, and that hath been a Soldier, to maintain Decency; and the other a Doctor or Lawyer, to regulate Affairs with Learning, and by the Pen.

The Trumpeter that brought the Letters from the Maid of Orleans to the Earl of Suffolk was burnt; and the Reason of that was, because he came from no lawful Prince, nor one commissioned, or capable of sending a Trumpeter. Grimston's History of France, fol. 326.

* That the German Princes may have such a Prerogative, but it is *secundario tantum jure*. Et qui jus mittendorum Legatorum *secundario tantum jure habent*, mittantur Legati non de Rebus, universum concernentibus

Imperium, sed tantum sui Territorii ratione; eo enim ipsis intuitu tantum datum, ultra igitur terminos non est procedendum, fieret enim alias præjudicium Imperatori, &c. Kirchnerus §. 25. Memorable was that of the Switzers, who sent a Message to the French King, that he should not send them an Ambassador with store of Words, but a Treasurer with Plenty of Money. † Monmouth's History of France, fol. 27, 28.

V. The Right of Ambassadors is secured both by the Safeguard of Men, and also by the Protection of the Law Divine; therefore to violate this, is not only unjust, but impious too: And as Protection is given to the Legates of Pompon. Leg. Supreme Rulers by the Laws of Nations; so by the Civil Law there is a Protection likewise for Provincial Legates,

Liv. lib. 16.

Kings conquered in a solemn War, and deprived of their Kingdom with other Royalties, lose the Right of Legation. P. *Emilius* detained the Heralds of *Perseus*, whom he conquer'd.

* *C. Poole* a Traitor fled

to Rome; the Pope sent him Ambassador to the French King, of whom the King of England demands his Subject, *sed non prevaluit.* Coke Instit. 4. fol. 153.

Rot. Pat. 3.

R. 3. num. 18.

gates, Heralds, and Consuls. This Right of Legation was originally provided faith *Livy*, for a *Foreigner*, not a *Citizen*; yet in Civil Wars, Necessity sometimes makes Place for this Right besides the Rule, as when the People are so divided into equal Parts, that it is doubtful on which Side the Right of Empire lieth, as that unhappy Spot of *Flanders*; or when the Right being much controverted, two contend for the Succession to the *Throne*; for in this Case one Nation is reckoned as two; and so was the State of *England*, when the *House of York* and *Lancaster* contended for the *Crown*, properly then called Commissioners: Nay, this Right of Legation hath been so preserved, that the very Messengers of Rebels have been protected, as were those of *Holland* by *Philip* of *Spain*. So great a Respect have Nations had in all times to such Men, that even * *Traitors*, nay *Pirates* and *Robbers*, who make not a Society, nor have any Protection by the *Law of Nations*, and with whom neither Faith nor Oath (as some conceive) may be kept; Faith being given them, obtain the Right of Legation, as once the Fugitives in the *Pyrenean* *Frontiers* did.

VI. Ambassadors may by a Precaution be warned not to come; if they dare, they shall be taken for Enemies, but once admitted even with Enemies in Arms, much more with Enemies not in actual Hostility, have the Protection and Safeguard of the Laws of Nations; and therefore their Quality being admitted by Safe-conduct, they are to be preserved as Princes; and so it was declared in *Parliament*, where the killing of *John Imperial* Ambassador from the States of *Genoa*, was High-Treason *Crimen læsæ Majestatis*.

† So likewise of *A. de Walton*, the King's Ambassador *Legatus ejus Nuncium Domini Regis missum ad mandatum Regis exequentem*, who was murdered by one *John Hill*, which Offence was adjudged High-Treason, and accordingly he was Drawn, Hang'd, and Beheaded.

† *Legatus ejus*

vicefungitur à

quo destinatur,

& honorandus

est sicut ille cui

vicem gerit,

& Legatos violare.

contra jus Gentium est,

22. Affize pl. 49. Note, This was the Year

Years before the making of the Statute of 25. E. 3. *quare* if such a *Proven* is within the Statute at this Day.

And by the *Julian Law*, he that violates Ambassadors is guilty of publick Violence; that is of prostituted Faith of publick Authority, and of a Breach of the Laws of Nations: And by the *Pontifical Law*, it is no less than a Pacle, and to be interdicted from the Benefit of holy things. *Philomela* sung a fatal *Requiem* for the bloody Entertainment which she gave the Ambassadors of *Frederick Barbarossa*, the Emperor having sent them to treat in order to Peace; but they instead of that avowed the Action of those that murdered his Ambassadors: The offended Emperor having taken the City, razed it to the Ground, and executed all the People therein as Rebels and Traitors against the Laws of Nations.

Qui violavit Legatum, Lege Julia de vi publica tenetur.

Fuller's Holy War, l. 3. c. 4.

VII. On the other Hand, Ambassadors may not always be received, though always they ought not to be rejected without Cause; for there may be Cause from him from whom they come, as the *Roman Senate* would not admit of the Embassage of the *Carthaginian*, whose Army was then in *Italy*; the King of *Spain*, those of *Holland*; and the then *Pope*, the Ambassador of *Henry the Second* after the Murder of *Becket* Archbishop of *Canterbury*: So likewise from the very Persons that are sent, as *Theodorus* the *Atheist*, whom *Lysimachus* would not give Audience to; and *Mr. Oliver*, *Lewis* the Eleventh's Barber, whom they of *Gaunt* refused: Yet *Matthæus Palmerius*, an Apothecary of *Florence*, had better Fortune than the *French Barber*; for he being sent in Quality of Ambassador to *Alphonso* King of *Naples*, and having acquitted himself Elegantly, and with much Generosity at his first Audience, the King having Information that he was an Apothecary, said, *Se sit in locum tali sono gli speciali di Fierenze, quali debbono essere gli Medici?* If the Apothecaries of *Florence* are such, what shall we think of their Physicians?

Camden 1571: quest ibi propositar, 4
Daniel's History of Henry 3. Carolus quintus Imper. Gallie, Venetorum, & Florentinorum ad bellum sibi indicendum missos deduci iussit
qui à comitatu suo abesset, triginta milliar. creta Guic. l.

So likewise where the Cause of sending is suspected, in reference to disturb the People, or with Intentions rather to sow Sedition, than to conclude a Peace (if such be their Errand) or not honourable, or unseasonable. As for those assiduous Legations which are now in use, they may with very good Right be rejected; for the no Necessity of them appears

18. Bellaius l. 3.

As my Lord Bacon observes in the Life of that Prince.

appears by the ancient Custom whereto they are unknown, which made *Henry* the Seventh admit of none.

The *Venetian* having admitted *Henry* the Fourth of France his Ambassador, yet they interdicted him * to come with the other Ambassador to the Chapel, till the King was reconciled to the Church of Rome.

VIII. By the Laws of Nations, only unjust Force is kept from the Bodies of Ambassadors; for if the Laws of Nations be broken by him, he is subject to Punishment: Yet the Opinions of Nations, and Men eminent for Wisdom, have been doubtful in this Point, and Precedents on both Sides have been avouched: One which seems to refuse that Position of punishing such Ministers of State: The Ambassadors of *Tarquin*, who had committed Treason at Rome, and as * *Livy* observes, were in the State of Enemies; yet the Right of Nations (as he calls it) prevailed so far as to preserve them, though in a Case of Hostility. On the other Hand, † *Salust* observes, that *Bornilcar*, one of the *Carthaginian* Ambassadors, who came to Rome on the publick Faith, was adjudged Guilty, rather (saith he) by the Rules of Equity, than by the Laws of Nations: Equity, that is the mere Law of Nature, suffers Punishment to be exacted where there is found a Delinquent, but the Laws of Nations except the Persons of Ambassadors: for certainly their Security out-weighs the Profit arising from Punishment which may be inflicted by him that hath sent him (if he be willing) if unwilling, it may be exacted of him as an Approver of the Crime.

An Enemy is bound to whom they are sent; but their Privilege obliges not those through whose Bounds they pass without Leave; for they go to, or come from their Enemies, or make any hostile Attempt, they may be slain. *Liv. lib. 26.*

IX. Again, as Ambassadors are not to render a Reason of their Actions to any other, but to him by whom they are sent; so it is impossible, by reason of various Interests and other Secrets of State, which pass through their Hands, but somewhat may be said, which bears a Show or Face of Crime; (which perhaps may prove otherwise yet the examining and tracing of the Truth, may be of dangerous Consequence; and therefore if the Offence be

* *Card. Arnold. Offat* in his 353 *Epistle Coke 4 Instit. fol. 153.*

*Menander Pro-
tector Justiniano
Imper. Aquarum
Legatos
contra jus Le-
gationum in
vinculis ha-
buit, Goth-
mann. Resp.
32. n. 29.
Coke Instit. 4.
153. 2 H. 5.
cap. 6. M.
Sess. 1. c. 1.*

* *Quonquam
visi sunt com-
mississe ut ho-
stium loco essent
jus tamen
Gentium valui-
t.*

† *Fit reus ma-
gis ex equo
bonoque quam
ex jure Gent.
Bornilcar co-*

*mes ei qui Ro-
manam fide publica venerat.*

*Grotius de Ju-
re Belli ac Pa-
cis, l. 2 c. 18.
§. 4. 4. & 5.
Senatus faci-
em secum attu-
lerat auctorita-
tem Reip. M.
Tull. 8.*

such as may be contemned, it is usually to be dissembled or connived at, or else the Embassadour be commanded to depart the *Realm*; and if the Crime be cruel, and publickly mischievous, the Ambassador may be sent home with *Letters of Request* to his Master, to inflict Punishment according to the Offence: So likewise in the Precaution of a great Mischief, especially publick, (if there be no other Remedy) Embassadours may be apprehended and executed; and if they oppose by Force of Arms; they may be slain.

*Sic Carolus
quintus Legato
Ducis Mediolanensis ut subdi-*

si sui imperavit, ne à Comitatu suo abscederet, Guicciard. in Diß. jam loc. Vide Gambden's Eliz. Anno 1571. 1584.

In the Bishop of *Ros's* Case, *An. 13 Eliz.* the Question was, *An Legatus qui rebellionem contra Principem ad quem legatus concitar, Legati privilegiis gaudeat, & non ut hostis penis subjaceat*; and it was resolved, That he had lost the Privilege of an Ambassadour, and was subject to Punishment; nor can Ambassadours be defended by the Law of Nations, when they commit any thing against the State or Person of the Prince with whom they reside.

*Hill 13 Eliz.
Bishop of
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Co. 4 Inst.
fol. 152.*

X. And why Embassadours are in Safety in their Enemy's Countries, and are to be spared when they commit Offences, is not so much for their own or Master's sake, but because without them there will never be an End of Hostility, nor Peace after War: Neither is the Name or Person of an Ambassadour so inviolable, either in Peace or in time of War, but there may be both a convenient time and a good Occasion to punish them, and this standing with the Laws of Nations, as may appear by the following Examples.

1. The Law does not pertain to them through whose Bounds Ambassadours pass without Leave; for if they go to their Enemies, or come from their Enemies, or make any hostile Attempt, they may be slain: So the Athenians did to the Ambassadours between the Persians and Spartans; the Illyrians to the Ambassadours between the Eleans and Romans.

*Thucyd. lib. 2.
Appian de
Bello Ilirico
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Legatos Syracusanorum missos
ad Civitates alias cepere.
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2. The Emperor Charles the Fifth, advertised of the League made against him, would not dismiss the Ambassadors

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Coke Inst. 4. fol. 152.

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2. The Emperor Charles the Fifth, advertised of the League made against him, would not dismiss the Ambassadors

*De Gallorum
ad Turcam le-
gatis, quos in
Pado Hispani
cepere occider-
runt, vide Ju-
dicia Perusæ,
lib. 11.*

*Camden Eliz.
Anno 1571.*

*History of
the Repub-
lick of Venice,
fol. 450, 451.*

sadors of France, England, and Venice, till his own were in Safety, but he sets Guards upon those of France, Venice, and Florence, causing them to be conducted thirty Miles from his Court, with a Prohibition not to speak to them, nor for them to write. As to him of Milan, as his Subject, he was enjoined not to part from Court; but as for him of England, there was no Alteration.

3. The Venetians having destroyed some of the Corsairs, Amurath commanded Luigi Contarini, then Bailio of Venice to be imprisoned.

4. The Seignior of Venice understanding that certain Traitors, who had revealed their Secrets to the Turk, were fled for Protection into the House of the French Ambassador at Venice, sent Officers to search the Ambassador's House; but the Ambassador refusing them Entrance, the Senate commanded certain Cannon to be brought out of the Arsenal to beat down his House, which when he saw planted, he surrendred up the Traitors.

5. The Embassadors of Tarquin, *Morte affigendos Romani non judicarunt, & quanquam visi sunt ut hostium loca essent, jus Gentium tamen valuit.*

6. The State of Rome, though in case of most Capital Crimes, exempted the Tribunes of the People from Question during the Year of Office.

7. The Embassadors of the Protestants at the Council of Trent, divulging there the Doctrine of the Church, contrary to a Decree there, whereby it was enacted a Crime equivalent to Treason, yet stood they protected from any Punishment.

It is generally consented by all the Civilians, That *Legis de jure Gentium indictum est, & eorum corpora salva sint, propter necessitatem Legationis, ac ne confundant Jura commercii inter Principes.*

8. Viva, the Pope's Legate, was restrained by Henry the Second for exercising a Power within his Realm, not allowed or admitted of by the King, in Disquiet of the State, and forced to swear not to act any thing in *præjudicium Regis vel Regni.*

On the other hand, it hath been answered, That they are by the Laws of Nations exempted from Regal Trial, all Actions of one so qualified, being made the Acts of his Master, or of those whom he represents, until he or they

*Goodwin de
Leg. Antiq.
Rom.*

*Acta Trident
Concilii.*

*Pompon. Leg.
ult. D. de Le-
gatis.*

*Benedict. in
Vita Hen. 2.*

they disavow; and Injuries of one *Absolute Prince* or State to another, is *factum hostilitatis*, and not *Treason*; the Immunity of whom *Civilians* collect, as they do the rest of their Grounds from the Practice of the *Roman State*, deducing their Arguments from these Examples.

9. The *Fabii* Ambassadors from *Rome*, were returned safe from the *Chades*, with demand of Justice against them only, although they had been taken bearing Arms with the *Etrurians* their Enemies.

Colloquium Machiav. l. 2. c. 28. Liv. 2. Dec.

10. King *Edward* the Second of *England*, sent amongst others a *French* Gentleman Ambassador into *France*; the King upon this arraigned him as a Traitor, for serving the King of *England* as Ambassador, who was his Enemy (but the Queen procured his Pardon.)

Sir Robert Cotton's Posthumus.

11. *Henry* the Third did the like to one of the Pope's Ambassadors, his Colleague flying the Realm secretly, fearing, *timens pelli sui*, as the Records have it. *Edward* the First restrained another of the Pope's turbulent Ambassadors, till he had (as his Progenitors had) informed the Pope of the Fault of his Minister, and received Satisfaction for the Wrongs.

Rott. Scaccar Westm. Clause Edm. primi.

12. *Henry* the Eighth commanded a *French* Ambassador to depart presently out of the Realm, because he was the professed Enemy of the See of *Rome*.

13. *Lewis de Prat*, Ambassador for *Charles* the Fifth, was commanded to his House, for accusing falsely Cardinal *Woolsey* to have practised a Breach between *Henry* the Eighth and his Master, to make up the Amity with the *French* King.

Lord Herbert's History Vita H. 8. Anno 1523.

14. Sir *Michael Throgmorton*, by *Charles* the Ninth of *France*, was so served, for being too busie with the Prince of *Conde's* Faction.

15. The Pope's Ambassador at *Paris*, was arraigned for practising certain Treasons in *France* against the King in the Parliament of *Paris*, and was there found guilty and committed to Prison.

16. Doctor *Man* then Ambassador was taken from his House at *Madrid* in *Spain*, and put under a Guard to a straiter Lodging for breeding a Scandal (as the *Conde Teri* said) in using by Warrant of his Place, the Religion of his Country, although he alledged the like permitted to *Guzman de Silva* their Embassadour in *England*, and to the *Turk* no less than in *Spain*.

Cambden's History Vita Q. Eliz. A. 1567.

17. Francis the First, King of France, sent *Cesar Fre-gosus* and *Anthony Rincone*, Ambassadors to the Turk; they were surprized by the Armies of *Charles* the Fifth on the River *Po* in Italy, and were put to Death; the French King complained that they were wrongfully murdered; but the Emperor justified their Death; for that the one was a *Genois*, and the other a *Milanois*, and his Subjects, feared not to serve the King his Enemy.

Lord Herbert's
History of
H. 8.

18. Henry the Eighth being in a League with the French and at Enmity with the Pope, who was in League with the French King, and who had sent Cardinal *Pook* to the French King, of whom King Henry demanded the Cardinal, being his Subject, and attainted of Treason, *sed non prævaluit*.

19. *Samuel Pelagii*, a Subject to the King of Morocco, pretended that he was an Ambassador sent unto the States General of the United Provinces; he came to them, and accordingly they treated with him, afterwards he departed; and being upon the Sea, he there took and spoiled a Spanish Ship; and then came into England; the Spanish Ambassador here having received Intelligence of the spoliation, caused his Person to be seized upon, intending to proceed against him as a Pirate, and imprisoned him; and upon Conference with the Lord *Coke*, *Dordridge* and other Judges and Civilians, they declared their Opinions, That the Caption of the Spaniard's Goods by the Morocco Embassadour, is not in Judgment of Law a Piracy, in regard it was apparent that the King of Spain and the King of Morocco are Enemies, and the same was done in open Hostility; and therefore in Judgment of Law could not be called *Spoliatio*, *sed legalis Captio*; and a Case out of 2 R. 3. fol. 2. was vouched, where a Spanish Merchant before the King and his Council, in *Camera Scaccarii*, brought a Bill against divers English-men, therein setting forth *quod deprædatus & spoliatus fuit* upon the Sea, *juxta partes Britanniae, per quendam Virum bellicosum de Britannia de quadam Navis*; and so of divers Merchandizes therein which were brought into England, and came into the Hands of divers English men, naming them, and so had Process against them, who came in, and pleaded, That in regard this Depredation was done by a Stranger, and not by the Subjects of the King, therefore they ought not to be punished; in regard that the Statute of 31 H. 6. Cap.

6. Cap. 4. gives Restitution by the Chancellor, in *Cancellaria sibi vocato uno Judice, de uno Banco vel altero*; and by the Statute of 27 Ed. 3. Cap. 13. that the Restitution may be made in such a Case upon Proof made, by the Chancellor himself without any Judge; and upon that Case it was resolved, *Quod quisquis extraneus, &c.* who brings his Bill ^{3 Bulstrode 28.} upon this Statute to have Restitution, *debet probare quod* ^{1 Ro. Rep. 175.} *tempore captionis fuit de amicitia Domini Regis*; and also *quod ipse qui eum ceperit & spoliavit, fuit etiam sub obedientia Regis, vel de amicitia Domini Regis, sive Principis querentis tempore spoliationis, & non inimicus Domini Regis sive Principis querentis, quia si fuerit inimicus, & sic ceperit bona, tunc non fuit spoliatio, nec deprædatio, sed legalis captio, prout quilibet inimicus capit super unum & alterum*: the Judgment of which Case was held to be Law, and thereupon the Judges delivered their Opinions, that the Morocco Ambassador could not be proceeded against as a Pirate.

20. In the time of Philip the Second of Spain, the Venetian Ambassador in Madrid protesting one Bodovario, a Venetian, an offender, that fled into his House, and denying the Corrigidor or Justice to enter his House, where the Ambassador stood Arm'd to withstand them; upon complaint made, the Ambassador was removed unto another House, till they had searched, and found the Offender; then conducting back the Ambassador with all due respect, a Guard was set upon his House to stay the fury of the enraged People; the Ambassador complaining to the King, he remitted it to the Supreme Council: they justified the Proceedings, condemning Bodovario to lose his Head, and other the Ambassador's Servants to the Gallies, all which the King turned to Banishment; and to satisfy the most Serene Republick, sent the whole process to Inego de Mendoza his Ambassador at Venice, declaring by a publick Ordinance unto that State, and all other Princes, That in case his Ambassadors should commit any offence unworthily, and disagreeing to their Qualities and Professions of Ambassadors, they should not enjoy the Privilege of those Officers, but he would refer them to be judged by the Laws of that Prince or State where they then resided, and where they had injured. It was a great and noble Saying. ^{Sir Hen. Wootton: State of Christendom, fol. 211.} ^{Vide Sir Robert Cotton's posthum. and the Proposition to King James.}

21. In the Year 1568. Don Gubernon d'Espes was ordered to keep his House in London, for sending scandalous Letters to the Duke de Alva unseal'd, and in 1586. Don

Don Bernardino de Mendoza, was restrained first, and after commanded away.

XI. The manner of proceeding against them, according to the practice in *England*, hath been conceived necessary to be, that some of the Chief Secretaries of State were sent to the Ambassadors, and by way of advice, that understanding that the Common People having receiv'd notice of, &c. " And that they cannot but conceive a just fear of uncivil carriage towards their Excellencies or their Followers, if any the least Incitement should arise, and therefore for Quiet of the State, and securing of their Persons, they were bound in love and respect to their Excellencies to restrain as well themselves as Followers, till a further Course be taken by legal Examination, where the Aspersions began, the same being in their opinions the best and the only way to prevent the danger, &c.

Sometimes, if the *Parliament* be sitting, the King acquaints the *Lords*, and then departs; who having had Conference with the *Commons*, conclude of a *Message* to be sent to the Ambassadors, (either by requiring an account of the matter or confining of them) the Persons to be sent, the two *Speakers* of both *Houses*, with some convenient number of either, having their Maces, or Ensigns of Offices born before them to the Ambassador's Gates, and then forborn; and then requesting speech with them, let them know that a Relation being made that Day, in open *Parliament* of, &c. they were deputed from both *Houses*, the *Great Council of the Kingdom*, to the which by the Fundamental Laws of this Nation, the chief care of the King's Safety, and the publick Peace and Quiet of the Realm is committed; and that they were no less the *High Court of Justice*, or *Supersedeas* to all others, for the examining and punishing all Attempts of so high a nature, &c. if it carry truth; and having executed their Commission, conclude that the *Houses*, to shew that reverence which they bear unto the Dignity of his *Master* by their *Message*, declare that they two who are never employed but to the King alone, were at that time sent, &c. and if the *Houses* shall upon return of their *Speakers* conceive their Answers (if it be a Matter that requires it) are such as may justly deserve their being confined, they then

then make an address to his Majesty to confine them to their Houses, restraining their departure till the Prince or State, whom they represent, be acquainted with their offence: And so it was done in 44 H. 3. to the Pope's Legates in England, and 28 E. 1.

XII. If a Foreign Ambassador, being a *Prorex*, commits here any Crime which is *contra Jus Gentium*, as Treason, Felony, Adultery, or any other Crime which is against the Law of Nations, he loseth the privilege and dignity of an Ambassador, as unworthy of so high a place, and may be punished here as any other private Alien, and not to be remanded to his Sovereign but of courtesie.

The Parliament not sitting, the Secretaries of State may signify the like, if occasion, &c.

The opinion of the Lord Coke, 4 Instit. fol. 153, &c.

XIII. But if any thing be *malum prohibitum* by any Act of Parliament, private Law, or Custom of this Realm, which is not *malum in se Jus Gentium*, nor *contra Jus Gentium*, an Ambassador residing here, shall not be bound by any of them; but otherwise it is of the Subjects of either Kingdom; for if a French Merchant or Spanish Merchant trades or imports any prohibited Goods, he must at his peril observe the Laws of England; and so it was adjudged *Pasc. 33 Eliz.* in the Exchequer, *Tomlinson, qui tam versus Henry de Vale & al.* upon the Statute of 19 H. 7. Cap. 21. but if an Ambassador imports any prohibited Goods, *è contra*.

The Florentines having sent Ambassadors to Charles the Fifth and Clement the Seventh, being then at *Bolonia*, together with their Household-stuff, they brought covertly many rich Commodities to sell and traffick with, supposing that they might be free from paying the Gabel; but the Searchers of the Custom-house having discovered it, they became objects of laughter and mirth to the *Bolonians*, and for that, as unworthy of the Office of Ambassadors, were remanded home without Audience.

Jovius fol. 125.

Sir Thomas Challoner having been sent Ambassador to Spain by Queen Elizabeth, remitted a Complaint to the Queen, that his Chests had been searched: upon which the Queen demanded the opinion of her Council in the point, who upon the whole matter resolved the Action into this, *Legato omnia æqui bonique ferenda dummodo Principis Honor non directè violetur*, the very words of Mr. Camden, An Ambassador must bear all things patiently, provided

vided that the Honour of the Prince (whom he serves) be not directly violated.

*Leg. si F. de le-
ga. in aut. de
sanctiff. S. re-
rum, coll. 9.*

XIV. The Office of an Ambassador does not include a protection private but publick, for the King is Master, nor for any several Subject otherwise than as it concerns the King and his publick Ministers, to protect them, and procure their protection in foreign Kingdoms, in the nature of an Office and Negotiation of State; therefore their Quality is to mediate and prosecute for them or any one of them, at the Council-Table, which is as it were a Court of State; but when they come to settled Courts, which do and must observe essential forms of proceeding, *scil. processus legitimos*, they must be governed by them: And therefore in the Case of Don Diego Serviento de Acuna, Ambassador Lieger for the King of Spain, who libelled in the Admiral Court as Procurator General for all his Masters Subjects, against one Jolliff and Tucker, and Sir Richard Bingley, for two Ships and their Lading of divers kinds, of the Goods of the Subjects of the King of Spain generally, and not naming of them *adduct ad Port de Munster*, in the Preface of the Libel generally against them all, and then proceeds and charges them severally thus; That Jolliff and Tucker Captain *Piratae*, in *alto Mari bellicè dictas Naves aggressi sunt*, & *per vim & violentiam* took them, and that they were *adductæ in partes Hiberniæ*, and that coming into the hands of Sir Richard Bingley, he converted them to his own use, (not saying where) and refusing to render them being required, it was there held that a Prohibition should go, for the matter is Tryable meerly at the Common Law, and that such a Procuration was not good, though to an Ambassador.

Lord Hobart,
fol. 78. Sed
Vide Cro. El.
685. Telv. 135.
173. Hard 183.
1 Sid. 320,
367. 2 Saund.
260. 2 Lev. 25.
1 Ven. 173,
308.

Don Alfonso de Valesco Ambassador from the Catholick King, attached Tobacoës at Land here, which one Corvero a Subject of the King of Spain, brought hither, and the Ambassador by his Libel supposed to belong to his Master, as Goods confiscated, as all other his Goods were. Sir John Watts the Plaintiff in the suggestion, prayed a Prohibition, which was granted accordingly, for the property of Goods here at Land must be try'd by the Common Law, however the Property be guided; and it was likewise rul'd, that if any Subject of a Foreign Prince bring Goods into this Kingdom, though they were confiscate before,

before, the Property shall not be questioned but at the Common Law, *Don Alfonso vers. Corvero, Mich. 9 Jac. Hob. 212. Hill. 9 Jac.* upon the like Libel by *Don Pedro Surega* Ambassador for Spain.

XV. Whether an Ambassador hath Jurisdiction over his own Family, and whether his house be a Sanctuary * *Distingui ser- me hac in re solent crimina. Vide Parumam, lib. 10. ubi Rex Gallia hanc ob causam iratus pacatur: Vide eundem, lib. 11. † Grot. de Jure Belli ac Pacis lib. 13. §. 4.* for all that fly into it, depends upon the concession of him with whom he resides, for this belongs not to the Law of Nations †; and it hath been seen that an Ambassador hath inflicted punishment on his own Servants and Vassals, as the *Moscovite* did here in England, but that must be purely by concession, as the *Turk* permits it to the English Ambassador at *Constantinople*: But for Fugitives that fly into their Houses, nay, their own Servants if they have greatly offended, cannot be drawn out by force, without a Demand and Refusal; which when done, it is then become as an offence in them.

XVI. Most certain by the Civil Law, the moveable Goods of an Ambassador, which are accounted an accession to his Person, cannot be seized on, neither as a pledge, nor for payment of a Debt, nor by Order or Execution of Judgment; no nor by the King or States leave where he resides (as some conceive) for all coercion ought to be far from an Ambassador, as well that which toucheth his necessities as his Person, that he may have full security; if therefore he hath contracted any Debt, he is to be called upon kindly, and if he refuses, then Letters of Request are to go to his Master *; so that at last that course may be taken with him as with Debtors in another Territory; to some this may seem hard, yet Kings, who cannot be compelled, want not Creditors; but the Lord Coke seems to be of another opinion †, for as to Contracts and Debts that be good *Jure Gentium*, he must answer here.

*Mich. 28 Car. 2. in Banc. Reg. * Grotius de Jure Belli ac Pacis, lib. 2. cap. 18. † Coke 4 Inst. fol. 153.* Certain it is that none dareth presume to meddle either with their Persons, Goods, or Servants, without leave had, the contempt of which hath been punished with Imprisonment.

XVII. If an Ambassador commits any private outrage against one of the Princes Subjects with whom he resides, unless it be to defend the Dignity of his Charge, or of his Master,

Master, it hath been conceived by some not to be justifiable before the Prince with whom he resides; (say they) there is a great difference between the *Dignity*, and *Authority* of the Prince in the Country of another Sovereign, for he may well retain his *Dignity*, but not his *Authority*. Usually Injuries of that nature being done, they have admitted debates at a *Council of State*, where the Sovereign, with whom the Minister of State hath resided, being satisfied, that Reparation ought to be made to the party injured, he hath been ordered, or at least requested, to comply with the same.

Barkscate in
memor. Grotii.

XVIII. But on the other hand, if any private outrage be committed by the Subjects of that Prince with whom he resides, upon his Person, the Offenders may be subjected to punishment. The Queen of *Sweden* having made the *Incomparable Grotius* (after he had escaped by Providence out of Prison, and by a greater from his *Country-men*) her Ambassador with *Lewis* the Thirteenth, with whom he resided at *Paris*, coming one day from *S. Germans*, the *Secretary of Ceremonies* being in the Coach with him, it chanced that in one place as they passed, a great number of People were in the way seeing of an Execution, his *Postilion* and *Coach-man* driving boldly through the Company, the *Archers* then attending the Execution with short Pieces, (concerned somewhat angrily that the Execution was disturbed) made after the Coach, shot his *Postilion* and *Coach-man*, and through the Coach, even through his Hat: the matter coming to be examined, the King ordered three or four of them to be hang'd, but that *Good Man* first pardoned them himself, and then obtained the King's.

XIX. The Republick of *Venice* imployeth generally more Ambassadors abroad than any other State, and they are as those of other Princes be, *Ordinary* and *Extraordinary*; the Commission of the Ordinary continueth for three Years, but he who resides at *Constantinople* is not called Ambassador, but *Bailio*, residing there perpetually; and that Republick allows him a greater Provision to support his *Grandeur*, than to any other, and by the Laws of *Venice* whatsoever he expends is allowed him upon his accounts without any examination: to which no other of their publick Ministers of State have like privilege.

By

By the Laws of *Venice* there can be no Extraordinary Ambassador employed, unless they have been Ambassadors formerly, and upon their return are strictly examined of their Comportment in their Legation, and are to discover what Presents they have received from the Prince or State to whom they were sent, the concealment of which is of a very dangerous consequence. *Bodinus de Re. pub. lib. 3.*

Nor may any of their Ambassadors receive any Preferment from any other State during their Legation. The Patriarch of *Aquileia* dying, *Hermolao Barbaro* being there Ambassador for that Republick, the Pope conferred on him that Ecclesiastical Dignity, and made him a Cardinal; which being known at *Venice*, notwithstanding he was a Person of great Merit, and had given notice to the Senate, rich, wellallied, and had good Friends, they sent express command that he should resign the Patriarchship, otherwise they would take from his Father the Procuratorship of *St. Mark*, and confiscate all his Estate. *Jac. Aug. Thuanus, l. 27. in Vita Augustini Barbado Duke of Venice, An. 1486.*

But if such Ambassadors have received any Present, Gift, or Reward from any Foreign Prince or Republick, and such Ministers of State are thought worthy of retaining the same, such a Grace must pass by the Suffrage of the Senate, to oblige them more to the benevolence of the Republick, than to the bounty of any Foreign Prince. The consideration of which put the same generous scruple into the Breast of *Sir Amias Paulet*, who returning from his Ambassy in *France*, would not at his departure receive from the French King the Chain of Gold which is given of course, till he was half a League out of *Paris*. But more famous was the late action of *Sir Leolin Jenkins*, His Majesty's Ambassador at *Nimeguen*, who, though after the Treaty concluded, absolutely refused the French King's Present. *Paulus Paruta in Hist. Ven. lib. 7. Francis Hotman, fol. 23. 24.*

XX. By the Laws of Nations, in the Reception of Ambassadors, those from a King are generally introduced by an Earl or Count, those from a Duke or Republik by a Baron; nor are they to be allowed that Honour but only at their first and last Audience.

XXI. Prophane Histories are full of Wars because of wrong done to Ambassadors; and in the Sacred Story is extant the memory of the War which *David* upon that Ground waged against the *Ammonites*: nor doth *Cicero* esteem

* *Grot. de Fure Belli ac Pacis*, l. 2. c. 18. §. 11.
 † *Montague Bishop of Norwich's Acts and Monuments of the Church*, fol. 450.

esteem any Cause more just against *Mithridates*; and at this day not only *Lawyers* *, but *Divines* † are all of the same opinion, That a War cannot be more justly commended than for the Violation done to their Publick Ministers.

C H A P. XI.

Of the Right of delivering Persons fled for Protection.

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| <p>I. Where Superiors may become culpable for the Crimes of their Subjects.</p> <p>II. Offences by whom properly punished, whether by the injured State or they into whose Territory the offender is fled.</p> <p>III. Whether Kingdoms and States ought to deliver up Fugitives, if required, or not.</p> <p>IV. Where Persons are fled, the places whither they come, ought to be Asylums.</p> <p>V. How distinguished, and when to be punished or delivered.</p> <p>VI. Whether an innocent Man may be deserted and delivered up to the enraged Power that de-</p> | <p>mands him.</p> <p>VII. Whether an innocent Person may be deserted and yielded, if War be threatened.</p> <p>VIII. Whether an innocent Person refused to be delivered up, ought to yield himself.</p> <p>IX. If Charity in an innocent to yield himself, whether Compulsion may be used if he refuses.</p> <p>X. Whether this of delivering up does extend to Sovereign Princes driven out of their Country.</p> <p>XI. Persons running away with the Publick Revenue, where their Persons and Goods have been seized till reparation and satisfaction be made.</p> |
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I. **F**athers are not bound for the fault of their Children, nor Masters for those of their Servants; nor Princes for the Actions of their Subjects, unless they become partakers in the Crime; the which may be done in two respects, by sufferance and receipt; therefore if Princes shall suffer or countenance their Subjects, by Pictures or Libels, or otherwise to abuse another Nation or Commonwealth, it is the same as if they should authorize it. *Brutus* to *Cicero*; *How can you make me guilty? Yes, well enough, as if it were in you to hinder it; but receipt may admit of some further scrutiny.*

Zeno interceding for the Magnets to T. Quintus and the Legates with him besought them with tears: ne minus amentiam civitati assignarent, suo quædam; periculo facere, Liv. l. 40.

II. Commonwealths being instituted, it was agreed that Faults of Particulars, which do properly belong to their own Society, should be left to themselves and their Sovereigns, to be punished or connived at, as they judged most fit.

Yet that *Right* is not so absolutely left to them, but Offences, which tend to the Destruction of Society or Government, whereof *Treason* is the chiefest, may seem to be excepted; for if a Subject shall commit an Act tending to the Subversion of his Sovereign's Government, the same is an Offence that's subject to an *universal punishment*, i. e. it is to be punished every where; and the Governours into whose Territory such fly, seem to have a Right of prosecuting for the Offence: In Civil Actions, which tend to Commerce that supports Society, the Subjects of foreign Nations having justly contracted Debts in their own Country, may obtain Justice in another; by a stronger Reason it is thought, that Princes or Republicks that have received publick Injuries, have Right to require Punishment for the Indignity that is offered them, at least for that which tended to the Subversion of their Government, and to have the Offenders delivered up.

III. The Question is Illustrious, Opinions grounded on several great Precedents have been both ways produced: It hath been generally held, That those Kingdoms where the Offenders are fled, ought to do one of the two, either punish them according to their Deserts being called upon, or leave them to the Judgment of the offended State; others on the contrary; most certain it is by the delivering up, is understood, to leave him to the legal Judgment of that Prince or State, whom he hath offended: And such was the Declaration of *Ferdinand King of Spain*, who had been often requested by *Henry the Seventh* to deliver up *Edmond de la Pool Earl of Suffolk* his Subject, then fled for Protection to that Prince's Country, but was always refused; but being continually importuned by Promises that he should not be put to Death, caused the Earl to be deliver'd up to him, who kept him in Prison, and construing his promise to be personal to himself, commanded his Son *Henry* after his Decease to execute him, who in the fifth Year of

5 Jac. in B. R.
Roll's Abridg-
ment, fol 530.
Weyer's Case.

For the knowledge of the Cause ought to precede the Decision; non decet homines audire causa non cognita
Plutarch in his Romulus
Attainted by Act of Parliament 12 H. 7. Ca. Inst. fol. 180.

5 H. 8. vide Lord Herbert's History of

H. 8. Pepin received, and would not deliver up those that are fled to him out of *Bavaria*, oppress'd by Tyranny. *Frederick* in reb. Pop. An. 1188.

his Reign in cold Blood performed the same. But the Malice of that politick Prince the Father, and the uncontrollable Will of the Son are Precedents but of small Force;
I. the

the Example of which not long after, gave the *French King* occasion to beware of trusting the latter with a Subject of his on the like occasion; for *Cardinal Pool* not many Years after, coming Ambassador from the *Pope* to the *French King*, they both being then in Amity, and *Henry* the Eighth in League with the latter, but in Enmity with the first, requested to have the *Cardinal* delivered up, but could not prevail, being doubly armed, as the Ambassador of a Sovereign Prince, (for such is the *Pope*) and in the Territory of a foreign State.

The *Israelites* required of the *Benjamites* to deliver up the wicked Men; the *Philistines* *Sampson*. *Cato* gave his Vote that *Cæsar* should be delivered to the *Germans*, for spoiling them without just Cause. Nor are nocent Persons injured, if they are either delivered up, or punished; yet does it not thence follow that they must be delivered up or punished: The *Romans* delivered up those that had done Violence to the *Carthaginian* Ambassadors; yet the Ambassadors of the *Abassines* having been traiterously murdered by one of the *Templars* at *Jerusalem*, the Offender being demanded, that so Justice might be executed on him for the Act, the *Grand Master* answered, That he had already enjoined him Penance, and had directed him to be sent to the *Pope*, but absolutely refused to deliver him up.

IV. But then, and as in this last, so in all other, the Offender must have committed some publick Offence*, as

* Yet out of Churches beyond Seas for private Offences, which are universal Sanctuaries, the Offenders have been taken: in Treason; for most certainly it extends not to private Injuries, because there is no Precedent that ever a War was begun for such, though they may contribute much, but for those which tend to the Subversion or Ruine of a Country, they often have been delivered up; *Fugurtha* of *Bocchus* in *Sallust*, So shalt thou at once free us from the sad necessity of prosecuting thee for thy Errour, and him for his

Lasitania, *Ferdinand* Lord Chamberlain was taken by Force out of the Church and burnt, for forcing a Noble Virgin. *Mariana* lib. 11. *Charles* Duke of *Burgundy* delivered up to *Lewis* the Eleventh, the Earl of *St. Paul*. Constable of *France*, who flying to some of his own Cities, obtained Letters of Safe-Conduct to come and commune with the Duke, in order to the making his Peace with the King; but the Duke after he had him in Custody, delivered him to the King of *France*, who immediately after cut off his Head. *Phil. Comines*, l. 4. c. 12.

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Treason. And by most Writers it is agreed, that such Offenders must either be delivered up or punished, the Election is left to their Choice, into whose Territory they are fled; though some have held, that in case of Protection or Sanctuary for such unfortunate Persons, † *Ludovicus Pius* the Emperor received those that

fled to him from the *Roman Church*, as appears by his Decree, Anno 817. and *Luther* himself did not want Princes to protect him from the Fury of *St. Peter's Chair*. *Vide his Colloquiums*, Printed in London, Ann. 1663.

T. Quintus Flaminius sent Ambassadors to *Prusias King* of *Bithynia*, for the procuring the delivering up the brave but unfortunate *Hannibal*, who accordingly being seized on, I will now, says he, deliver the Romans of that Fear which *vide Sir Wal-* hath so many Years possessed them; that Fear which makes them *ter Raleigh,* impatient to attend the Death of an Old Man: This Victory *lib. 5. cap. 3:* of *Flaminius* over me, who am disarm'd and betray'd into his *S. 2.* Hands, shall never be numbred amongst the rest of his Heroical Deeds: No, it shall make it manifest to all the Nations of the World, how far the ancient Roman Virtue is degenerate and corrupted; for such was the Nobleness of their Forefathers, as when *Pyrrhus* invaded them in Italy, and was ready to give them Battle at their own Doors, they gave him Knowledge of the Treason intended against him by Poyson; whereas those of a later Race have employed *Flaminius*, a Man who hath heretofore been of their Consuls, to practise with *Prusias*, contrary to the Honour of a King, contrary to his Faith given, and contrary to the Laws of Hospitality, to slaughter or deliver up his own Guest.

V. Though Kingdoms and States are looked upon as places of Refuge; yet that must be understood for those that are persecuted with causeless Hatred, not to such as have committed that which is Injurious to humane Society, or to other Men. *Gilippus* the *Laconian* in *Diodorus Siculus*, speaking of the Right of such miserable Fugitives, *Lib. 13:* saith, They that introduced these Rights at first; meant the Unfortunate should expect Mercy, the Injurious Punishment — After — These Men, if by the unjust Desire of that which is another's, they have fallen into these Evils, must not accuse Fortune, nor impose on themselves the Name of Supplicants; for

for that by Right belongs to them that have an innocent Mind, and adverse Fortune.

Carum occidisti, dum vis succurrere : nullum
Crimen habes ; manus est ibi purior, ac fuit ante.

But the Life of those Men full of wicked Acts, shut up against them all Places of Refuge, and leaves no room for Compassion. Cicero hath a Saying out of Demosthenes : We must shew Compassion to those whom Fortune, not their own evil Deeds, hath made Miserable. And by the holy Law, when any one had been slain by an Ax slipping out of another's Hand, the Cities of Refuge were open : the most holy Altar it self was no Protection for those that had slain an innocent Man maliciously, or had troubled the Commonwealth ; which Law Philo explaining, saith, *Unholy Men have no Entertainment in the Holy Place.* Lycurgus the Orator relates that one *Callistratus*, having committed a Capital Fault, and advising with the Oracle, received answer, *That if he went to Athens he should have Right* : and thereupon, in Hopes of Impunity, he fled to the most holy Altar there, notwithstanding which he was taken from thence, and put to Death by the City most observant of her Religion, and so the Oracle was fulfilled. Princes indeed (saith Tacitus) are like Gods, but neither do the Gods hear the Prayers of Supplicants, unless they be just. Such then are either to be punished or delivered up at least ; yet surely this hath been observed to extend only to those Crimes that touch the State, or at least are of a very hainous Nature ; sometimes they are expressly stipulated by Leagues to be delivered up ; however this is to be observed, that such sort of Fugitives and Supplicants, be they Foreigners or Subjects, are to be protected till they have been fairly tryed ; and if that whereof they are accused, be not forbidden by the Law of Nature or Nations, the Cause must be tryed and adjudged by the Municipal Laws of that Kingdom or State from whence the Crime doth arise. From which it may be observed, that a Fault committed in *England*, and the Person flying, and Request made ; yet, by Reason that none can by the Laws of that Nation be tryed but *per Pares*, nor then but in Person ; it will thence follow, that

They of *Holland* lately delivered up the famous poisoning Cook that had been in the wicked Conspiracy with the Countess of *Soissons* in *France*.

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that such may seem out of the general Rule : However, it may stand with the highest Reason, that the Fact and Proof being remitted over with the Request, there may appear a just Ground for the Demand.

VI. Whatever the Opinion of those Writers have been, the Practice of latter Ages hath seemed to incline otherwise. *Queen Elizabeth* demanded *Morgan* and others of her Subjects fled into *France*, that had committed Treason against her ; the Answer of the *French King* was, *Si quid in Gallia machinaretur, Regem ex jure in illos animadversurum ; sin in Anglia quid machinati fuerint, Regem non posse de eisdem cognoscere, & ex jure agere ; omnia Regna profugis esse libera ; Regum interesse, ut sui quisque Regni libertates tueatur, imo Elizabetham non ita pridem, in suum Regnum Mountgumerium, Principem Condaem, & alios e Gente Gallica admisisse, &c.* and they were never delivered up ; but the like was not returned by the King of Scotland, for he promised that he would transmit *Ferniburst* and the Chancellor too, if they were convicted by a fair Tryal.

34 *Eliz. Cam-*
den, fol. 35.
Vide Camb.
Anno 1585.

Perseus King of Macedon, in his Defence to *Martius*, speaking of those that were said to have conspired against *Eumenes* : So soon as I was admonished by you, and finding the Men in Macedonia, I commanded them away, and charged them never to return into my Dominions. The Cry of the late Royal Martyrs Blood, justly procured them of *Holland* to deliver up the Regicides to the injured Successor.

Liv. lib. 22.
cap. 37.

Anno 1660.

And from the Crown of *Denmark* it was expressly stipulated they should be delivered in these Word : *Item quod si qui eorum qui rei sunt illius nefandi Parricidii in Regem CAROLUM Primum beatissimæ Memorix admissi, ac legitime de eodem scelere attincti, condemnati, vel convicti, &c.*

In the Alliance between those Crowns, Feb. 13. 1660. provided for in the fifth Article.

If any of them who are guilty of the horrid Murder committed upon King *CHARLES* the First of Blessed Memory, be either now in the Dominions of the King of *Denmark* and *Norway*, or shall hereafter come thither, that as soon as it shall be known or told to the King of *Denmark*, or any of his Officers, they be forthwith apprehended, put in safe Custody, and sent back into *England*, or be delivered into the Hands of those whom the King of *Great Britain* shall order to take charge of them, and bring them home.

That poli-
tick Princess
Queen Eliza-
beth gave the
Scots a more
equitable an-
swer. when
they demand-
ed *Bothwell*,
she answered,
that she
would either
render him
up, or send
him out of England.

VII. Most certain it is, if War be threatned to a Nation or People, if they deliver not up the Offender, though perhaps he is innocent, and that such is the Malice of his Enemies, that they know they will put him to death, yet he may be deserted especially if that Nation or Kingdom is inferiour to others; but then the same ought not to be done rashly. The *Italian* Foot that forsook the unfortunate *Pompey* before all was lost, being assured of Quarter from the Victorious *Cæsar*, were condemned by most that reported the Story of that day.

Cambden Anno 1593.

Pope Alexander (in the mortal Feud between him and the *Emperor Frederick*, who favoured *Octavian* the Anti-pope) fled disguised to *Venice*, the *Duke* and *Senate* being jealous that the *Emperour* would demand him, sent an Embassy to the *Emperour* to endeavour a Mediation and Peace, which was no sooner offered, but the *Emperour* broke out into a Rage, bidding them go home, saying; Tell your Prince and People, that *Frederick* the *Roman* Emperour demands his Enemy, who is come to them for Succour, whom if they send not presently bound hand and foot, with a sure Guard, he will proclaim them Enemies to him and the whole *Empire*, and that there is neither Alliance or Laws of Nation which shall be able to free them from revenge for such an Injury, to prosecute which he is resolved to overturn all Divine and Humane Laws, that he will suddenly bring his Forces before their City, and contrary to their expectation, plant his Victorious Eagles on the Market-place of *St. Mark*. This Message been faithfully delivered, the *Senate* decreed Arms, Arms; and while they were preparing, News was brought that *Orbo*, the *Emperour's* Son, and General of the *Cæsarean* Fleet, was entred the *Gulph* with seventy five Gallies; the most valiant and religious *Sebastiano Cyani* resolved to meet him, and having encountred them on the Coast of *Istria*, defeated *Orbo* and all his Naval Forces, taking forty eight Gallies, *Orbo* their Admiral and the rest either burnt or destroyed; he returned in Triumph for *Venice*, and not long after *Frederick* became convinced, that Heaven fights the Battles of the Innocent, and on his knees beg'd pardon of *Alexander* the Fugitive Pope.

*Hist. Reip. Ven.
In Vita Sebastiani
Cyani Duke
of Venice, An.
1164.*

Lewis

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Lewis the Eleventh of *France* required by Ambassadors of *Philip* Duke of *Burgundy*, the delivering up of *Sir Oliver de la Marche* (who being a *Burgundian*, had wrote (as was conceived) somewhat against the Claim of the *French* to several Territories) upon a publick Audience at *Lisle* they were answered by *Duke Philip*, That *Oliver* was *Steward of his House*, a *Burgundian by birth*, and in no respect subject to the *Crown of France*; notwithstanding if it could be proved that he had said or done any thing against the King's Honour, he would see him punished according as his faults should deserve.

VIII. But admitting that such an Innocent Person ought not to be delivered up, whether he is bound to yield himself; by some it is conceived he ought not, because the nature of Civil Societies, which every one hath entred into for his own Benefit, doth not require it; from which it follows, that though such Persons are not bound to that by Right, properly so called, yet it doth not follow, but in charity he seems bound to do it; for there may be many Offices not of proper Justice, but of Love, which are not only performed with praises, but also cannot be omitted without blame; and such indeed is the Act of such a Person's voluntary yielding up himself, preferring the Lives of an Innocent multitude before his own. *Cicero* for *P. Sextus*, If this had happened to me sailing with my Friends in some Ship, that Pirates surrounding us should threaten to sink us, except they would deliver me, I would rather have cast my self into the Sea, to preserve the rest, than to bring my Friends either to certain Death, or into great danger of their life. The Request of the Noble *Strafford* is fresh in our Memories.

Idem de finibus
3. *Vir bonus &*
sapiens, & Le-
gibus parens, &
civilis officii
non ignarus, u-
tilitati omni-
um, plusquam
unius alicujus
aut sue consu-

lit. And in *Livy* therere is a most excellent saying of some *Molossians*: *Equidem pro Patria qui lethum oppetissent sepe fando audivi; qui patriam pro se perire equum censerent, hi primi sunt.* *Liv. lib. 45.*

IX. But whether such an Innocent Person may be compelled to do that which perhaps he is bound to do, may be a question, rich Men are bound by the precept of Mercy to give Alms to the Poor, yet cannot be compell'd to give: it is one thing when the parts are compared among themselves, another when Superiours are com-

* Leg. Desert. red to their Subjects, for an Equal cannot compel his Equal, but unto that which is due by right strictly taken; yet may a Superiour compel his Inferiour to things which Vertue commands; in a Famine to bring out Provisions they have stored up, to yield him * to Death that deserts his Colours, or turns Coward, to mulct those that wear excessive Apparel †, and the like. Photian, pointing to his dear Friend Nicocles, said, *Things were come to that extremity, that if Alexander should demand him, he should think he were to be delivered up.* It hath seemed that such an Innocent Person might be deserted and compelled to do

* The Son of Pompey was so worthy a Son of so great a Father, that he contended with *Anthony* and *Augustus* about the *Empire of the World*; this Pompey entertaining *Anthony* and *Augustus* in his Galley, the Captain which commanded it, demanded leave of him to weigh Anchor and to carry away his Guests, and to make his Rivals Prisoners: he answered him, that he ought to have done it without telling him of it, and should have made him great without having made him forsworn: certainly an honest Person will never be of the Mind of this Captain: therefore in such extremities Counsellors, either for high advantages, or in the great necessities of their Prince should serve their Masters with their Estates and Goods, but not with their Honour and Conscience.

X. But this delivering up does in no respect extend to Sovereign Princes, who are by Divine permission unfortunately driven out of their own Country; and therefore memorable is the great Treaty commonly called by the *Flemings*, *Intercursus Magnus*, where there was an express Article against the reception of the Rebels either of *Henry VII.* or of the *Arch-Duke of Burgundy* by others, purporting that if any such Rebel should be required by the Prince, whose Rebel he was, of the Prince Confederate, that forthwith the Prince Confederate should by Proclamation command him to avoid the Country, which if he did not within fifteen days, the Rebel was to stand proscrib'd and put out of Protection. But a Prince, or one that hath a Sovereign Power; and had been contending for his Right, but Success not crowning his hopes, occasioned his flight, hath always been excepted; to deliver up such, is even against Nature and the Majesty of Power; and therefore it is very remarkable what attempts were made for E. 4. H. 7. nay in the very Treaty

12 H. 7.
Lord Bacon's
History of
Henry the
Seventh, fol.
162.

of *Intercursus magnus* it is memorable that at that time *Perkin Warbeck* was contending with *H. 7.* for the Crown of England by the name of *Richard Duke of York's* younger Son and surviving Heir Male of *Edward the Fourth.* My Lord *Bacon* does take a particular notice, that *Perkin Warbeck* in that very Treaty was not named nor contained, because he was no Rebel, but one that contended for the Title. Afterwards when *Perkin* was fled into Scotland, and there received by the Scottish King, *Henry the Seventh* sent to have *Perkin* delivered up, and it was one of the principal Inducements of the King to accept of a Peace upon that condition, giving for an argument, that *Perkin* was a Reproach to all Kings; and a Person not protected by the Lawes of Nations; but the Scotch King peremptorily denied so to do, saying, *That he (for his part) was no competent Judge of Perkin's Title, but that he had received him as a Suppliant, protected him as a Person fled for refuge, espoused him with his Kinswoman, and aided him with Arms, upon the belief he was a Prince, and therefore he could not now with his Honour so unrip, and (in a sort) put a lye upon all that he had said and done before, as to deliver him up to his Enemies.* This was so peremptorily insisted on by

Lord Bacon's
History of
Henry the Se-
venth, fol.
176.

the Scotch King, that *Henry the Seventh* was at length contented to wave the Demand, and conclude a Peace without that Article; notwithstanding the King of Scotland had often in private declared, that he suspected *Perkin* for a Counterfeit. What Endeavours were used by the late *Usurper* with those of *Holland* and with Cardinal *Mazarine* concerning his present Majesty, and how his Royal Person and Brothers were after the Murder of their blessed Father like *Partridges* hunted from place to place, the World and the shameful Stories of that Age can too well evince. But on the other hand, as we have said, those that have committed Offences that strike directly at Government and the Murder of their respective Princes, have found but cold Harbour in the Territories of Foreign Princes; however in Cases of like nature Princes have often stipulated with each other for the delivering up Offenders of that magnitude as hath been already mentioned.

XI. Persons that have wronged or defrauded Kings of their Revenue, especially in *England*, upon Letters of Request

Request to those Princes whither they have fled, have been delivered up.

Some *Florentine* Merchants of the Society of the *Frisco baldi*, being made Collectors and Receivers of the King's Customs and Rents in *England, Wales, Ireland, and Gascoigne* running away with those Monies, together with all their Estates and Goods for *Rome*, the King sent his Letters of Request to the *Pope*, desiring that they might be arrested and their Persons and Goods seized, and sent over to satisfy him for the damages he and his Subjects had sustained by them, promising not to proceed against them to the loss of their Limbs or Lives. Upon which Letters, the *Pope* seized on their Goods, and not long after the King Writ for the seizing of their Persons, for answering of other frauds and injuries.

The like was done for one *Anthony Fazoni*, who had received 500 *l.* of the King's Monies, and running away with it to *Lorraine*, the King writ to the same *Duke*, desiring that search might be made, and his Person seized upon, and his Goods secured in every place within his Territories, till he should satisfy the said 500 *l.*

Rott. Romæ
An. 4 E. 2.
M. 17. Dorso.

Rott. Romæ 4
E. 2 M. 16.
Dorso.

Claus. 8 E. 2.
M. 31. Dorso
pro Rege.

C H A P. XII.

Of Contribution paid by Places Neuter to both Armies in War.

- I. Of force used to Neuters whether lawful.
- II. Of Neuters, their duty consider'd in reference to either of the Warring parties.
- III. Considerations general touching the same, and the chief matters that are objected by those that scruple thereat.
- IV. The Case stated generally in the question propounded to our Saviour of paying tribute to Cæsar.
- V. In the payment of Contribution to an Enemy, what is necessary to be distinguished in the beginning of a War.
- VI. Of a second distinguishment drawn out of the first, of such payments, when a War is actually formed.
- VII. Where a man pays, but mislikes the cause, whether excusable, the War not yet actually formed in place.
- VIII. Where a Country is fully possess'd, whether payment then is lawful.
- IX. Of the state of those that live on Frontiers, their condition considered in reference to procure their peace by Contribution.
- X. Of interdiction by him to places from whom faith is owing, Contribution notwithstanding being paid, whether the same creates an offence in them.
- XI. Of the genuine construction of such interdictions according to the true intention of the same.
- XII. Of the impunity and punishment that such innocent Offenders may be subjected to, in case of being questioned for the contempt by their right Governours.

I. IT is manifest there is no Right of War over Neuters in War; yet because by occasion of the War many things are usually done against such (Borderers especially) on pretence of necessity, there can be no Excuse for the act, unless it be apparent Necessity, and that the same ought to be extreme, for then it may give a Right over what belongs to another Man; for in such case, if the necessity be manifest, there may be such a proportion exacted as the necessity requires, that is, if the Custody suffices, the Use of the thing is not to be taken; if the Use, not the Abuse, be necessary, yet is the Price of the thing to be restored. *Moses*, when the highest necessity urged him and the People to pass through the Land of the *Idumeans*, first he saith, *he would pass along the highway,*

* See to this purpose his excellent Speech to his Soldiers near Sicily, when he marched into Africk, and the Narration of his March thorrow Africk. *Vandak. i.*

way, and not divert into their Corn-fields or Vineyards; if he had need but of their Water, he would pay a price for it. The worthy Captains, both Greek and Roman, have done the like: In Xenophon the Greeks with Clearchus, promise the Persians to march away without any damage to the Country, and if they might have necessaries for Money, they would take nothing by force. This Vertue is often commended in * *Belisarius* by *Procopius* his Companion and Witness of his Actions.

Exemplum notabile videtur apud Peritum, lib. 8. Thucydides l. 1.

Præcep. Got. l. 1.

II. And as the Law doth preserve the Estates and Territories of such Neuters, or those that abstain from War, so on the other hand such ought to do nothing for either Party, but especially for him who maintains a bad Cause, or whereby the Motions of him who wagemeth a just War may be retarded; and in a doubtful Case they ought to shew themselves equal (as we have mentioned elsewhere) to both in permitting passage, in affording Provision for the Legions or Navies, and in not relieving the Besieged. It is the duty of the Athenians, if they would not side with any Party, either to prohibit the Corinthians from raising Souldiers out of Attica, or permit them to do the like. So the Emperor and Confederate Princes of the Empire, with the Cantons of Switzerland in the late German War, and so of the King of England, who was so careful to preserve the Neutrality, that he issued forth his Proclamations to prohibit all Persons, of what Condition soever, to become Soldiers in the Service of any of the warring Princes. It was objected by the Romans against Philip King of the Macedonians, That the League was violated by him two ways, both because he did injuries to the Fellows of the Roman People, and because he assisted the Enemy with Aids and Money. The same things are urged by Titus Quintus in his Conference with Nabis, Yet thou sayest, I have not violated you, nor your Friendship and Society, how often shall I prove the contrary? In short, wherein is Friendship violated? by these two things especially: If thou hast my Friends for Enemies, if thou art a Friend to my Enemies: he is reckoned an Enemy who supplieth them with what is useful for the War.

III. But now there are many things that are useful for the War worthy of some consideration, the which are not so accounted at this day by the Laws of Nations; understand me, That I call the Laws of Nations, which is

at this day universally practised, as namely the supplying either or both of the warring Parties with Monies, or that which is called *Contribution*. Now if the Minds of the Subjects cannot be satisfied by the declaration of the Cause, it will certainly be the Office of a good Prince or General rather to impose upon them Contribution than Military Service, especially when that Prince or General hath an Army sufficient to prosecute his Designs, the which a just Commander may use as God doth the ready Service of the Devil.

*Sil. in Verb.
bellum p. 1. n.
7. circa finem.*

The most excellent *Grotius* having most incomparably treated on, and cleared all the important Objections against a just War, together with the Incidents of the same; yet this main one of *Contribution* or paying to both Armies, whether lawful, he hath not touched in any other words but these, *Quod sub tributo utrique parti præstando factum in Belgico, Germanico bello nuper vidimus, estque id consentaneum mori veteri Indorum* †: and so cites a saying † *Grot. de Jure Bell. ac Pacis, lib. 3. cap. 12. §. 4. n. 2. Lib. 2.* in *Diodorus Siculus**, of the Peace that those People maintained in their Possessions by reason of such Contributions. But to many Persons this Instance without further scrutiny, proves insufficient; for there are many, who not finding this Liberty in their Consciences, unnecessarily chuse rather to give up their Bodies to restraint, and to abandon their whole means of Subsistence in this World, both for themselves and their Children, (which ought not fondly to be done, *unless we would be worse than Infidels*, as *S. Paul* saith) they ground their Resolution on this Reason, that they know not whether the Monies they give may not furnish to the Destruction of many Innocents, and perhaps the just Magistrate; yea, and the total subversion and ruine of their Country, Liberty and Religion: and therefore though Men give and bestow their own where they please, yet in such Cases they may not; therefore it may not be impertinent to examine whether these be necessary Scruples in themselves, and such as admit of no exception of Liberty, or whether those Scruples be reasonable, or indeed meer scandal.

IV. The Scribes and Pharisees sought two ways to enrap Our Saviour; one was if he had blasphemously taught a new Religion, and a new God, (*viz. himself*) they

Deut. 13.

they hoped the People would be provoked to stone him for this, according to the *Hebrew Law* : The other was, to bring him within the compass of *Treason*, as if he could not lead great Multitudes after him without traiterous designs ; but this *Gin* fail'd too, because the Multitudes which followed him were always ready to defend him. However, when he was at *Jerusalem*, where the *Roman Troops* and *Prætor* were, they thought they had him sure, by propounding this Subject to him :

Is it lawful to pay Tribute to Cæsar ? which was as much as to say, We who are descended from *Abraham*, and are the peculiar People, to whom God hath given the large Privileges of the Earth at home, to bath our selves in Rivers of Milk and Honey, to have full Barns and many Children ; yea, that GOD himself would be adored in no other place of the World but at this our *Jerusalem*, and that abroad we should triumph over the *Barbarous* and uncircumcised World by virtue of that *Militia*, which he never ordered for any but our selves ; how are we then in Duty or Conscience to submit now to the Ordinances of the *Uncircumcised Romans* ? Or what Right can he have to exercise supreme Jurisdiction over us, the privileged Seed of *Abraham*, by levying of Taxes on our Estates and Lands, which GOD himself laid out for us, by which means the *Emperor* and *Senate* hold this very Temple in slavery, and insult over our very Consciences and Religion, by defiling our very Sacrifices with the mixture of impure Blood ; which as they are the price of our Blood, and a Tribute far above *Cæsar's*, (payable in no other Place but this Temple, which GOD himself built) so our Blood ought not to seem too dear to be sacrificed for the Liberty of these : and though the *Roman State* could pretend, yet what can this *Cæsar* pretend ? Every man's Conscience knows that it was but the other day he usurpt over the *Senate*, in which resides the true Jurisdiction of *Rome* ; and if that were otherwise, yet how can he pretend to a Title unless Poyson be a Pedigree, or violent Usurpation a just Election, by which he who is but the greatest Thief in the World would now pass for the most Sovereign and Legitimate Prince ? How then are we in Conscience obliged to pay Tribute to this *Cæsar* ? Though those Lawyers thought in their Consciences that they were not to

say it, and that *Our Saviour* likewise, as a *Jew*, thought too; yet they supposed he durst not say so much in the crowd; nor yet deny it by shifting it off with Silence, lest the *Roman Officers* should apprehend him: But when *Our Saviour* shewed them *Cæsar's Face* upon the Coyn, and made them *Render to Cæsar that which was Cæsar's, and to GOD that which was GOD's*; His answer ran quite otherwise, not as some would have it, that by a Subtily he answered not to the Point proposed, for then the sense of the whole Text would sound very ill in such Terms, viz. if there be any thing due to *Cæsar*, pay him it, and if any thing is due from you to *GOD*, then pay it likewise; This had been a weakening of *GOD's Right* for *Cæsar's*, and to have left a desperate doubting in a necessity: 'Tis beyond all cavil that *Our Saviour's* Opinion was positive for paying of *Tribute* to that *Cæsar*, because *de facto* he did pay it; and the plain Reason of it appears evidently in his Answer: *Cæsar's Face* was upon the Coyn, that is to say, *Cæsar* by Conquest was in Possession of that Coyn, by possessing the place where he obliged them to take it; Coyn-
Coke 3 Instit. fol. 16, 17.
 ing of Money being one Prerogative of Sovereign Power.

V. But to come more close to the Question, whether Contribution may lawfully be paid: First, we are to make a Difference betwixt *perferre & inferre bellum*; the one is active, and properly at the beginning of War, and in a place where yet no War is, and where Cause only, and not its Effects can be considered; in this case every thing ought to be very clear for Warrant of a Man's Conscience, because of the Calamities which it helps to introduce, and is in some manner the Author of: the other is passive, and there where War, or the Power of War is actually formed, which is the Case of this Discourse.

VI. Secondly, we are to distinguish betwixt that which cannot be had, nor the Value of it, unless we actually give it, and that which may be taken by the Law of War whether we contribute or no.

VII. Most certain it is, though a War be not yet actually formed in a place, yet a scrupling Conscience, which excuses not the Cause, may be excus'd in contributing to it in this one Case, viz. if some number of Men, able to take what they ask, demand (with an armed power) the payment

4 H. 4. 2.

Procopius in
the third of
Goth. of Totilas
when he be-
sieged Rome,
saith, *Agricolis*

*interim per omnem Italiam nihil mali intulit; sed iussit eos ita, ut soliti erant, terram
perpetuo securos colere, modo ut ipsi Tributa perferrent:* This, saith *Cassiodorus*, is the
greatest praise. 12. 15.

ment of a certain sum to be employed in War, then in
such a case, the Man, whom we suppose, may pay it
as a Ransom for his life, or give it as a Man doth his
Purse, when he is surpris'd in the High-way, because to
this Man it is as much as if the whole Country were pos-
sess'd with an Armed Power. So several *Dutchies* and
Seigniories dependent on the *Empire*, do in the present
War between them and the Crown of *France*, pay Con-
tribution at this day.

But if the Person or Country be not for the time in full
Possession of him whose Cause he scruples at, and that he
or they have not a probable fear of extreme danger, nor
as probable assurance, that without his help the thing de-
manded nor its value can be taken from him or them,
then there is little Excuse remains for the Act, because
the very Act (which his Conscience dislikes) participates
more of Action than of Passion.

VIII. But where a Man or City is fully possess'd by
an invading Power (be the same just or unjust) from
whom he or they cannot fly, nor remove their Substance,
most certain the payment of Contribution is no gift any
more than he (as above) who with his own Hands being
set upon by Pirates or Robbers, puts his Purse into their
Hands; for the Laws calls not that a Gift, nor excuses
the Party from taking it: And altho' the Parties may
employ the same to the Destruction perhaps of Innocents
and the like; yet that is an Action out of their Power
that give, as far as Winds and Tempests are, to which
two, as we contribute nothing, so we cannot be scrupu-
lous in our Consciencies concerning their bad Effects,
nor is the same repugnant to the *Canon Law*, (which
teaches us humanity, and the imitation of all their virtues,
and therefore Persons, whose Lives are innocent and
harmless, ought not to be subjected to danger or plunder
which hardly can be avoided without Contribution or
Tribute.

44 E. 3. 14.

4 H. 5. 3.

Coke 3 *Instit.*
fol. 68.

C. 2. de *Treug.*
et *Pace. Nic.*
Damasc.

IX. Again

IX. Again, those that live on Frontiers, whose condition is more ticklish and deplorable, because they are not fully possess'd nor taken into the Line of either Party, these live as it were in the Suburbs of a Kingdom, and enjoy not the Security or Privileges of others, yet such Persons may lawfully contribute to both; for though they be but partly possess'd by one, and partly by the other, in respect of their sudden abandoning them, yet both Parties have the Power of destroying them wholly; wherefore those former Reasons which justify those fully possess'd, do also acquit the Payments of these; for their condition here is more calamitous, seeing they are really but Tenants at Will, expos'd to a perpetual Alarm, and that both Parties wound one the other only through their fides, as those this day that are situate between *France* and *Germany*; for being perhaps Neuters in the War, they are in that case by the Law of Arms to shew themselves equal to both, in permitting of Passage, in affording Provisions for the Armies, and in not relieving the Besieged.

The quiet of the World cannot be had without Arms, no Arms without Soldiers Pay, nor Pay without Contribution.

Tacit. Hist. 4.

Exemplum nobile videtur apud Parutam, lib. 8. Gröt. l. 3. c. 17.

X. Nor can the Interdiction of him to whom such owe Faith and Obedience, any ways create the same an Offence, since the declared Wills of our Governours cannot make all those of our Acts Sins, when we obey or submit to that Power, which against our Wills (as much as against theirs, and it may be with more of our Misery) hath divested them of the Power of their Rights, and deprived us of the Power of their Government; and by the Laws of War, they who have overcome, should govern those whom they have overcome; and therefore whatever is exacted by the Conquerors, may justly be paid by the Conquered.

Gröt. de Jure Belli ac Pacis, l. 3. c. 8. §. 11. c. 12. §. 4.

And since Princes by their Commands cannot change the nature of human Condition, which is subject naturally to those fore-mentioned Changes, it would seem exceeding hard to oblige us to almost moral Impossibilities; and though those Political Commands were as Laws, yet doubtless they ought not to be obliging, but according to the Legislative Rule, which is *cum sensu humane imbecillitatis*, this is that which is called the presumptuous Will * of a Governour, or the Mind of a Law: for in * extrem necessity it is to be presumed, that both their

Jure hoc evenit ut quod quisque ob tutelam corporis sui, jure fecisse existimet.

Leg. ut vim. D. de just. & jur.

Wills proceeding from the Rigour of what they have declared, rather than by holding to that which is their supposed Right, introduce certain Miseries and Confusion without receiving any Benefit thereby to themselves. Nor could they of *Utrecht*, and others of the conquered Cities in *Holland*, abandoned afterwards by the *French*, and entirely preserved from Destruction, be condemned by their *Confederates*, for the Sums by them promised to the Enemy for the Preservation of the same.

And that is
apparently e-
vinced by the
Laws of
Leagues; for
such being
made, the
same remains,
although the
same King or his Successor be driven out of his Kingdom, for the Right of the Kingdom remains, although he hath lost the Possession. *Grotius de Jure Belli ac Pacis, lib. 2. cap. 17. §. 19.*

Neither are such Commands or Interdictions without their sense and profit; though they be not positively obeyed; for thereby Governours shew to all the World, that they renounce no part of their Right, no, though it be there where they cannot exercise any part of their just Power.

XI. Now the true Intention of such Commands or Interdictions is, that the Enemy should not by any means be assisted or strengthened; but if such Prohibitions should be obeyed, nay at such a time, when they and all their substance are absolutely possess'd by the Enemy, most certain such Commands dash against themselves, and the one countermands the other; for if they refuse to submit in such a case, then they do that which advantages their Enemies, because at that time they will take all, whereas in Case of Submission they ask but a part.

XII. In all Wars there are always some, by whose Disaffections Enemies gain more than by their Compliance, just as Physicians do by Distempers.

And although, by after variety of Successes, the just Governour should recover that place, which so submitted to the Power of their Enemies, and for that reason should punish those that were pliable to extream Necessity; yet it follows not upon that, that they who so conformed, sinned, or did that which was absolutely unlawful; for we well know that reason of State often calls for Sacrifices where there is no fault to expiate: *Ostracism* and *Jealousy*

must make away those who are known to deserve most ; In Republica
out in strict Right (which is the Term of this Question) idem est nimis
the just Governour ought to look upon them as more um, & nihil
Unfortunate than Faulty. mereri.

CHAP. XIII.

Of the Naval Military part.

The Advantage that Princes have
by a good Commander.

I. The Love that naturally proceeds
from the Mariners to those that
are valiant and generous.

II. Princes in prudence ought not
to listen too much to the Com-
plaints against Commanders.

V. Of the faults generally consider-
ed in Soldiers and Mariners.

Of the punishments that gene-
rally wait on such Offenders.

I. Of Drunkenness, Swearing, and
other such sort of Impieties, not
to be suffered in Fleets.

II. Spies, 'tis lawful to use them by
the Laws of Nations, but being
deprehended, are to suffer Death ;
and how they are to be dealt with-
al by the Laws of England.

III. It is not lawful for a Friend
or Neuter to relieve an Enemy, and
Persons so offending, how punisht.

A. Ships taken as Prize, the Ship,
Papers, and other matters concern-
ing the same, are to be preserved.

Of things taken and acquired in
War; how the Right of them be-
comes vested in the Captors, and
how that is to be understood by the
Law of Arms.

I. To steal the Cables or other Fur-
niture of the King of England's
Ship, how punishable at this day.

II. Ships surrendered or voluntari-
ly yielded, how to be dealt with,

and to those that shall resist, if
entred by force; whether quarter
may be refused.

XIII. Ships of War generally
ought not to be yielded; but if en-
tered or disabled, whether they
may not accept of Quarter, stand-
ing with the Oath called Sacra-
mentum Militare.

XIV. Of obeying Orders, the same
ought punctually to be followed ;
and if broken, though the act suc-
ceeds well, whether the same sub-
jects not the Actor to punishment.

XV. Of the Obligation incumbent
on Commanders and Soldiers, to
behave themselves valiantly, and
the right of slaying an Enemy,
where lawful.

XVI. Ships how obliged by the Law
of Arms to the Assistance of one
another; and of the duty of those
that have Fleets under their Con-
voy.

XVII. An Enemy beaten ought to be
pursued, and how far it is lawful
to slay such flying with their lives
in their hands, by the Law of
Arms, and how the recking sword
ought to be governed.

XVIII. Persons exempted from the
sword by the Laws of Nature ;
Nations, Civil and Canon, and
by the Municipal Laws of some
Countries.

- XIX. *Mutinying how esteemed, valued and punished at this Day by the practice of Armies, and by the Laws of England.*
- XX. *Whether it be lawful to decoy the Subjects, Soldiers, or Mariners of an Enemy to forsake his Prince or General, and to bring over his Men, Ships or Arms, and where by Law they may be received; and how such Deserters may be punished by the Laws of Nations and of England.*
- XXI. *Of Seducers, Message-carriers and Decoyers of Soldiers, how to be handled by the Law of Arms.*
- XXII. *Of those that shall disobey or strike their superior Officers, how punishable.*
- XXIII. *Of mutinying, and those that shall act in the same, how punished, though they have a just Cause of Complaint.*
- XXIV. *Of the Care incumbent on Commanders and Masters of the Great Ships, in reference to their safety, and the punishment of wilful burning and destroying them.*
- XXV. *Of the general offences at Sea, how punished.*
- XXVI. *Court Marshals how erected, and what Operation their Judgments have, and upon whom.*
- XXVII. *Judges and Advocates Power in reference to give an Oath, and the Admiral's power how limited in the punishing of Offences.*
- XXVIII. *Of maimed Soldiers and Mariners, and the Provisions that the Laws makes for them at this day.*
- XXIX. *Of Triumphs.*

I. **A**N excellent General is an Evidence of the Fortune of a Prince, and the Instrument that occasions the Happiness of a Kingdom; and therefore when God makes choice of a Person to repair the Disorders of the World, or the Good of a particular State, then is his Care shewed in the furnishing him with necessary Principles to undertake great Matters; the Thoughts are put in his Soul by that Eternal Commander to execute, he troubles and confounds his Enemies, and leads him as by the Hand to Victories and Triumphs: And one of the greatest Expedients whereof he serves himself for this Purpose, is to raise unto him excellent Men, both in Courage and Conduct, to whom he communicates his Care, and who help him to bear the Weight of Affairs. *Alexander* had never conquered *Asia*, or made the *Indies* to tremble, but for *Ephestion*, *Parmenio*, and *Clitus*; *Cæsar* gained many a Batel by his Lieutenants; and the fairest Empire of the World, which Ambition and the Evil of the times had divided into three Parts, was reduced under the Dominion of *Augustus* by the Valour of *Agrippa*; *Justinian* triumphed over *Persia*, and destroyed the *Vandals* in *Africa*, and the *Goths* in *Italy* by the Aid of *Belisarius* and *Narsetes*: And it is most certain, that Noble Commanders are the Glory

Glory of their *Princes*, and Happiness of the *People*; on the other Hand, Base, Cowardly and Treacherous Generals are the Shame of the one, and the Despair of the other.

II. Hence it is, that Soldiers and Mariners draw their Lines of Love even to the Mouths of Cannons with a good General, but Mutiny and Hate to the main Yard end against one that is Bad; for to obey them who are not their Sovereigns when they do them Hurt, when they insult and are cruel in cold Blood, and Base, Cowardly or Treacherous in Battle, is a sad Necessity for them, and a hard Essay of Patience; yet must they be obeyed, and the Soldiers and Mariners must not rebel or repine, but submit till their Sovereign Redresses their Misfortunes.

III. Again, *Princes* ought not to listen too much to the mutinous Demands of the Crew, or any others whose Ambition watches their Ruin, whereby to conceive Anger against their *Commanders*; for it is easier to purge out the Choler and Discontent that is got under the Hatches, than to provide *Commanders of Conduct*, Courage, and Faithfulness to govern their Expeditions. *Belisarius*, that most excellent Commander, who had no other Crime than his Reputation, and was not culpable, but that he was Pow-
erful, having conquered *Persia*, subdued *Africa*, humbled the *Goths* in *Italy*, led Kings in Triumph, and made ap-
pear to *Constantinople* some what of *Old Rome*; an Idea of the ancient Splendor of that proud Republick; after all his eminent Services, this great Person is abandoned to Envy: A Suspicion ill grounded, destroys the Value of so many Services; and a simple Jealousie of State, wipes them out of the Memory of his Prince: but he rests not there, for the Demeanour had been too gentle, if Cruelty had not been added to Ingratitude; they deprive him of all his Honours, they rob him of all his Fortune, they take from him the Use of the Day and Light, they put out his Eyes, and reduce him to the Company of Rogues, and the miserable *Belisarius* demands a Charity; even that *Belisarius* the chiefest General of his Age, and the greatest Ornament of the Empire, who after so many Victories and Conquests, accompanied with so

Procopius Hist. Vandal. in Vita Belisarii.

Vide Sir Walter Raleigh.

l. 5. c. 6. §. 2.

And in that whole Paragraph the Ingratitude that hath been shewn by Princes to many Brave and Noble Generals and Commanders, there particularly enumerated.

high and clear a Vertue, and in the midst of *Christendom*, was reduc'd to so abject and low a Misery.

Nor was this cruel and hasty reckoning of *Justinian* let slip without a cruel Payment; for *Narcete*, who was as well a Successor in Merit as in Authority to *Belisarius*, having notice of a disdain, conceived likewise against him upon a single Complaint, resolved not to expose himself as a Sacrifice to their Malice; and therefore thinking it better to shake off the yoke, than stay to be oppressed, soon spoiled the Affairs of *Justinian*, for the *Goths* revolted, and Fortune would not forbear to be of the Party which *Narcete* followed, nor to find the *Barbarian* where so brave a Captain was engaged. Therefore not one or many Faults are to be listened to against Commanders, but patiently heard and redressed, nor to disgrace or lose them; for such having committed a Fault, yet being admonished by love, may endeavour by future Services to make recompence by some noble Exploit; but disgraced, become Instruments often of Danger and Ruin to their Superiours.

IV. Soldiers and Mariners Faults are either proper to themselves, or common with others.

Those are common with others which other Men fall into, and are corrected with like ordinary Proceedings as other Crimes of like Nature, as Man-slaughter, Theft, Adultery, and such like.

Those are proper which do purely appertain to the *Naval Military* part, and are punished by some unusual or extraordinary Punishment: As are these; Not to appear at the over musters or calling over the Ship, to serve under him he ought not to serve, to vage or wander long from on Ship-board, altho' he return of his own accord, to forsake his Fleet, Squadron, Ship, Captain, Commander, or Officer, to leave his standing to fly over to the Enemy, to betray the Fleet, Squadron, or Ship, to be disobedient to his superiour Officers, to lose or sell his Arms, or to steal another Man's, to be negligent in his Officer's Command, or in his Watch, to make a Mutiny, to fly first out of the Battel, and the like, which are very frequently set forth in the Titles of the *Digest* and *Code of Military Affairs*, and other like Titles which accompany them.

S. De re milit.
De castrensi pec-
culio, & C. eo-
dem tit. l. 12.
C. de erogatio-
ne militaris
annonæ & C. de
off. Militari.

Arrian,

Arrian, who wrote the Life of *Alexander the Great*, observes, Every thing is counted an Offence in a Soldier, which is done contrary to the common Discipline, as to be neglectful, stubborn, and slothful.

V. The Punishment wherewith Soldiers and Mariners are corrected, are those corporal Punishments, or a pecuniary Mult or injunction of some Service to be done, or a motion and removing out of their Places, and sending them away with shame.

By capital Punishment is understood for the most part Death, or at least beating with Cat with Nine Tails, as they commonly term it, Ducking, Wooden-Horse, Gauntlet, and such like, unless happily it be pardoned, either for the unskilfulness of the Mariner or Soldier, or the Mutiny of the Crew or Company, being thereto drawn by Wine, Wantonness, or for the Commiseration or Pity of the Wife and Children of the Party offending; all which is left to the Discretion of the Lord Admiral, and others the Supream Commanders or Captains.

VI. It is necessary that in Armies and Fleets, all manner of Impiety should be prohibited, especially that of Swearing and Cursing; for such Sins are so foolish, that they unawares trip Men into Damnation, rendring Men worse than Beasts, by how much the more they court that Vanity of Sin, without any of the appendant Allurements which other vicious Actions are accompanied with, the same in the end teaching Men to disavow GOD in their discourse and actions, by their intemperate and inconsiderate invoking him in their Oaths. Against such, as also against those that shall give themselves up to Cursing, Execrations, Drunkenness, Uncleanness, or other scandalous Actions in Derogation of God's Honour, and corruption of Good Manners; Fines and Imprisonment, or such other Punishment may be inflicted on them by a Court Marshal, which is now reduced to the Forfeiture of one day's Pay; but for Drunkenness, the same extends not to Commanders, or other Commission and Warrant Officers, for they upon Conviction before the Admiral, shall be rendred incapable of their Command.

13 Car. 2. cap. 9. Artic. 2.

By Order of his Royal Highness the Duke of York, 1666.

And a Lyar convicted on Ship-board, shall be hoisted upon the main Stay with four Braces, having a Broom and Shovel tied to his Back, where he shall continue an

Hour, every Man crying, *A Lyar, A Lyar*, and a Week following, he shall clean the Ship's Head and Sides without board, according to the ancient practice of the Navy; if he receives greater Wages than for an able Sea-man, then half a day's Pay.

Lib. 2. c. 3:

§. ult. ad Leg.
Corn. de Sica-
riis pun.

VII. By the *Laws of Nations*, Spies may be sent to survey the Enemy's Force, Fleet, Station, or Squadron, and make discovery of whatsoever may give advantage to the Persons sending: So *Moses* and *Joshua* did into the *Holy Land*. On the other hand being apprehended, they are to be put to death, as *Appian* saith. But whether it be lawful to make Spies of the Subjects of that Prince with whom the War is begun, hath been some doubt: It is not lawful for a Subject to kill his King, nor to yield up his Ships of War without publick Council, nor to spoil his fellow Citizens, to these things it is not lawful to tempt a Subject that remains such; nor may any reply, That to him who impelleth such a Man to a wicked Act, that Act, as namely the betraying of his Enemy, is lawful; no body doubts, he may indeed do it, but not in that manner; but yet if a Subject will voluntarily desert his Prince and Country, *i. e.* so enter into a Correspondency with the Enemy of it, without any impulse but his own covetous or revengeful Mind, surely it cannot be unlawful for the other to receive him. *We receive a Fugitive by the Law of War*, saith *Celsus*, that is, it is not against the Law of War to admit such, even a Traitor, who having deserted the Enemy's part, electeth ours; however such Persons ought not to be rendred, unless expressly stipulated*, but ought to be pardoned. By the *Laws of England*, if any Officer, Soldier or Mariner, in actual Service, and in the Pay in his Majesty's Fleet, or any other Person in the same, shall give, hold, or entertain any Intelligence to or with any King, Prince or State, being Enemy to, or any Person in Rebellion against his Majesty, his Heirs and Successors, without Leave or Authority from the King, Admiral, Vice Admiral, or Officers in Chief of any Squadron, they are to suffer Death. Now the bare receipt of a Letter or Message from an Enemy, will not make a Man subject to the Penalty of this Article; and therefore the subsequent Article explains the precedent, in which it is provided, That if any infer-

our,

Leg. transgug.
D. de acq. re-
rum Dom.

* As was in
the Peace
with Philip,
the *Æteliens*,
Antiochus, Po-
lyb. in excerpt.
legat. 11. 28.
38. Menand.
Proter idem.
non decet.

Stat. 13 Car.
2. cap. 9. Ar-
tic. 3.

our Officer, Mariner, or Soldier, shall receive any Letter, or Message from any King, Foreign Prince, State, or Potentate, being an Enemy, or on their behalf; and if such Person doth not reveal the same within Twelve Hours, having opportunity so to do, and acquaint the Superior Commander with it, such Person is to suffer Death; so likewise, if such Superior Officer or Mariner being acquainted therewith by an Inferior Officer, Mariner, or other, or such Superior Officer, Commander or Mariner, in his own Person, receiving a Letter or Message from any such Enemy or Rebel, and shall not in convenient time reveal the same to the Admiral, Vice-Admiral or Commander of the Squadron, he shall suffer the like pain of Death, or such Punishment as a Court Marshal shall inflict. Now Spies are put to Death sometimes justly by those that manifestly have a just cause of Warring, by others by that licence which the Law of War granteth; nor ought any Person to be moved with this, that such being taken, are punished with Death; for that proceeds not from their having offended against the Law of Nations, but from this, that by the same Law every thing is lawful against an Enemy: And every one, as it is for his own Profit, determineth either more rigorously or gently: But that Spies are both lawful and practicable, there is no Question; for at this day by the general Instructions of Fleets, there are always out of each Squadron some Frigats or Ships appointed to make discovery of the Enemy; and upon sight to make sail, and to stand with them, in order to take cognizance of their Force, as well Ships of War as Fire-Ships, and in what posture they lay; which being done, those detecting Frigats are to speak together, and to conclude on the Report they are to give, which done, they return to their respective Squadrons; such Ships in such Service are not obliged to fight, specially if the Enemies Force exceed them in number, or unless they shall have an apparent Advantage.

Artic. 4.

Ad Leg. Corn.
de Sicariis pun.

Tacit. Hist. 5.

Bartol. Leg.
nullus Leg. 3.
de Judais Ca-
lucolis.

Procop. Goth.

Ne-

VIII. Again, it is not lawful for any, be he Friend or Neuter, to relieve an Enemy, much less for a Soldier or Mariner in pay; to supply him that conspires the destruction of my Country, is a liberality not to be allowed of: he is to be accounted an Enemy that supplies the Enemy with

Stat. 13. Car. 2.
cap. 9. Artic. 5.

Necessaries for the War; and therefore by the Laws of England, War is so to be esteemed; and by the Laws of England, If any Person in the Fleet relieve an Enemy or Rebel in time of War with Money, Victuals, Powder, Shot, Arms, Ammunition, or any other Supplies whatsoever, directly or indirectly, he shall suffer Death.

Artic. 6.

IX. Ships being assaulted and taken as prize, all the Papers, Charter-parties, Bills of Lading, Pass-ports, and other Writings whatsoever that shall be taken, seized or found aboard, are to be duly preserved, and not torn or made away; but the very Originals are to be sent up entirely and without fraud to the Court of Admiralty, or to the Commander appointed for that purpose, in order to the Condemnation of the Prize, upon pain of the Captors losing their Share in the Prize, and also subject to such other Punishment as a Court Marshal shall think fit.

Deut. 20. 14.

X. The Right of taking of Spoil was approved of God within those natural Bounds which have been already mentioned, as is further evinced by the Appointment of God in his Law concerning the Acquisition of Empire over the conquered, after refusal of Peace, *All the spoil thereof shalt thou take unto thy self, and thou shalt eat the spoil of thine Enemies, which the LORD thy GOD hath given thee.* Hence it is, that things taken from the Enemy presently become theirs that take them by the Law of Nations, and such Acquisition is called *Natural*, for no

Leg. Nat. S. ult.
de D. acq. rer.
Dom. tit. de
rer. dom.

*Qua armis
quæsitæ essent
& præda belli
jure non dimittenda.*

any cause, but the naked fact is considered; And thence a Right ariseth; for as the Dominion of things began from Natural Possession, and some print of the same remains in the things taken in the Land, the Sea, and the Air, so likewise of things taken in War; all which instantly become theirs that first become Captors: and from the Enemy are judged to be taken away those things all which are taken away from the Subjects of the Enemy. But though this gives a Right to the Captors, yet that must be understood to the Sovereign, or to the State that employed them, and not to themselves; but if they have any share of the Prize, the same proceeds by the condemnation or grant of the Sovereign, which may be enlarged or abridged as occasion serves; and therefore by the Laws of England, *Ships of War having taken a Prize*

Artic. 7.

The Goods and all manner of Lading is to be preserved, till Adjudication shall pass; but that is to be understood, where the Ship voluntarily yields: but Ships whom they shall assault, and take in fight as Prize, the pillage of all manner of Goods and Merchandizes (other than Arms, Ammunition, Tackle, Furnitures, or Stores of such Ships) as shall be found by the Captors, upon or above the Gun-Deck of the Ship, become theirs; but this is to be understood where such Prize may lawfully be possess; for there are times when such are not to be meddled with; and therefore it is against the Rules of War in Fight, if some of the Enemies Ships are there disabled; yet those Ships that did so disable them, if they are in a condition to pursue the Enemy, cannot during the Fight take, possess, or burn such disabled Ships, and the reason is, lest by so doing some more important service be lost, but they are to wait for such Booty, till the Flag-Officers shall give command for the same.

By the donation of his Majesty.

Artic. 2.

Vluzzali, King of Algier, in the famous Battel of Lepanto, having behav'd himself very valiantly there against the Christians, so that he destroyed several of their Gallies, and others, he took amongst the rest the Gallies of Pietro, Buca of Corsa, and of the Prior of Messina, and Ludovico Tico of Trabu, Benedeto Soranza, the which he towed after him before the Battle was compleated; but that getting proved the loss both of the one and of the other; for the Turks out of Covetousness of the Plunder, or otherwise thronging into them, occasioned their taking there, in which the Victors in those Flames became Victims, and after followed the total Rout of the Ottoman Power.

Hist. Reipubl. Venet. fol. 127, 128.

XI. It is almost impossible, but that in Ships of War, which in these days carry so considerable a force of men, there will be some amongst them that have Heads of knavery, and Fingers of Lime Twigs, not fearing to steal that from their Prince which is applicable only for the Good of their Country; such sort of Night-wolves when caught, are to be severely punished; and therefore to steal or take away any Cables, Anchors, Sails, or any of the Ships Furniture, or any of the Powder or Arms, or Ammunition of the Ship, subjects the Offender to the pains of Death, or to such other Punishment as the Quality of the Offence shall be found by a Court-Martial to deserve.

Artic. 3.

XII.

Artic. 9.

*Cræsus per-
swading Cyrus
not to give up
Lydia to be
pillaged by
his men, tells
him, Non me-
am, inquit, non
res meas diri-
pies, nihil enim
ad me jam ista
adpertinent:
tua sunt, tua
illi perdent.*

Herod. lib. 1.

** Victor de Ju-
re Belli, n. 49.
& 60.*

*D. & C. de Ju-
ris & facti ig-
norantia.*

Princes in-
deed are Gods,
but neither
do the Gods
hear the pray-
ers of suppli-
ants, except
they be just.
The *Saracuse-
ans* were ac-
cused for that
they slew the
Wives and
Children of
Hycetas, be-
cause *Hycetas*
had slain the
Sister and Son
of *Dion Plu-
tarch*, *Timon*,
& *Dion*.

XII. By the Ninth Article, *Foreign Ships or Vessels taken as Prize, without fighting, none of the Captains, Masters, or Mariners being Foreigners, shall be stripp'd of their Cloaths, or in any sort beaten, pillaged, or evil intreated; and the Persons so offending being obliged to render double Damage:* This Law most expressly doth not extend to those that obstinately shall maintain a Fight; for most certain, by the Law of Arms, if the Ship be boarded and taken, there remains no restriction but that of Charity; and if a Ship shall persist in the Engagement, even till the last, and then yield to mercy, there hath been some doubt, * whether Quarter ought to be given to such; (for they may ignorantly maintain with courage a bad cause) but in Captives and those that yield or desire to yield, there is no danger. Now that such may be justly killed, there must be some antecedent Crime, and that such a one as an equal Judge would think worthy of Death; and so we see great severity shewed to the Captives and those that have yielded, or their yielding on condition of Life not accepted, if after they were convinced of the Injustice of the War, they had nevertheless persisted with Hatred or Cruelty, if they had blotted their Enemies Name with unsufferable disgraces, if they had violated their Faith or any Right of Nations, as of Ambassadors, if they were Fugitives: But the Law of Nature admits not Taliation, except against the very individual Person that hath offended; nor doth it suffice that the Enemies are by a fiction conceived to be as it were one Body; tho' otherwise by the Laws of Nations, and by the Laws of Arms, and at this day practised, in all Fights, the small Frigates, Ketches, and Smacks are to observe and take notice of the Enemies Fire-ships, and to watch their Motion, and to do their best to cut off their Boats, and generally the persons found in them are to be put to death, if taken, and the Vessel, if not taken, destroyed; and the reason why the extremity of War is used to such, is that by how much the Mischief is the greater by the Act of such Men, if executed, by so much the Punishment is aggravated, if taken, and Quarter denied them by the Law of War.

XIII. Every Captain or Commander upon signal or order of In England
 Battel, or view, or sight of any Ships of the Enemy, Pirate, when the Ad-
 Rebel, or likelihood of Engagement, are to put all things miral would
 the Ship in fit Posture for a Fight, as the breaking down the have the Van
 Cabins, clearing of the Ships of all things that may impede the of the Fleet to
 Soldiers in the preserving the Ship and themselves, and endea- tack first, the
 maging the Enemy; and every such Commander or Captain are Admiral did
 on their own Persons, and according to their Place, to hearten generally put
 and encourage the inferiour Officers and Common Men to fight abroad the U-
 valiantly and courageously, * and not to behave themselves faintly nion Flag at
 under the Disgrace of being cashiered, and if he or they yield the staff on
 to the Enemy; Pirate or Rebel, or cry for quarter, he or they the fore-top-
 to doing, shall suffer the pains of Death, or such other Punish- Mast head
 ment as the Offence shall deserve. Now, though Soldiers (that was
 or Mariners have obliged themselves faithfully to serve when the Red-
 in the Expedition or Navy; yet that is to be understood Flag was not
 no further than his or their power to do their utmost in abroad.) But
 his or their Quality; for though the Obligation for the if the Red-
 Service be taken in the strictest Terms of undergoing Flag had been
 death and danger; yet it is to be understood always con- abroad, then
 ditionally as most Promises are, viz. if the action or pas- the fore-top-
 sion may be for that Fleet or Prince's advantage, and fail was to be
 therefore if the Fleet or Squadron is beaten and the Ships lowered a lit-
 are disabled, and left scarce without any to defend them, tle, and the
 now the Soldiers or * Mariners remaining can do no more Union-Flag
 for their Prince than die, which indeed is to do nothing was to be
 at all, but to cease for ever from doing any thing either spread from
 for him or themselves; in those straits therefore it is not the Cap of
 repugnant to their Oath called *Sacramentum Militare*, to the fore-top-
 ask quarter or to strike, and having beg'd a new Life and Mast down-
 taken it, they are bound in a new and just Obligation of wards. When
 Fidelity to those whom they were bound to kill few hours the Reer of
 which the Fleet was
 to tack first,
 the Union-
 Flag was put
 abroad on the
 Flag-staff of
 the Mizon-
 top-Mast-
 head, upon
 which

two Signals the Flag-Ships were to continue the same Signals on their Ships, till the
 same was answered; when the Admiral would have all the Ships to fall into the
 Order of Battel prescribed at the Council of War, the Union-Flag was put on the
 Mizon Peak of the Admiral's Ship, upon sight of which the Admirals of the other
 Squadrons were to answer it by doing the like Signal; when the Admiral would have
 the other Squadrons to make more sail, though himself shorten sail, a white Ensign
 was put on the Ensign-staff of the Admiral's Ship: Instructions first of May, 1666.
 but yet signals may be altered or changed as often as it shall please the Admiral to
 think the same necessary and convenient.

* Artic. 10.

* Lipsius de Mil. Rom. l. 2. dial. 6, & 4. And Polybius expresseth the Oath thus, Ob-
 temperatus sum, & facturum quicquid mandabitur ab Imperatoribus juxta vires: and such,
 says he, were termed *Milites per Sacramentum*, before

before; neither can the Prince or General expect by virtue of their former Obligation to him, they should kill any in the place where the quarter was given: However, this Fidelity hath not its inception from the time of taking quarter; but when the Battle is over, and that time which is termed cold blood; for without all controversy, if a Ship be boarded, and Quarter is given, yet if while the Fight lasts, the Persons Captives can by any possibility recover their Liberty and Ship, they may by the Law of Arms, justly acquire the same *.

* Sir Thomas
Chicheley did

so aboard the *Katherine in bello*, Anno 1666. inter *Carolus Secundum & Celso & Pro-*
positos Dominos Ordines Generales Fœderati Belgii.

And since Impunity is granted to such unfortunate Deserters, yet it must be apparently evident and fully proved, that they were reduced into a Condition beyond all hope in the Battle: and therefore the Foot that forsook the *Unfortunate Pompey* before the Field was lost, were justly condemned for the breach of the *Roman Discipline* and Law of Arms: and therefore the Article hath not positively declared Death only, but added, or such other Punishment as the Offence shall deserve, which Provision leaves the Action to be judged and punished by a Council of War, who know best what's to be done in Cases of that nature; however, a base or cowardly yielding, or crying quarter, is to be punished with Death, and that without mercy.

Xenoph. Cyr.
Plutarch. Qu.
Rom. 39. &
Marcell.
Vide in Tit.
Shipsof War.

L. g. desert. D.
de re Milit.

Liv. lib. 7.
Manliani Im-
peria.

XIV. The obeying of Orders hath in all Ages been in mighty esteem: *Chrysantus*, one of *Cyrus's* Soldiers, being upon his Enemy, withdrew his Sword, hearing a Retreat sounded; but this comes not from the external Laws of Nations; for as it is lawful to seize on the Enemy's Goods, so likewise to kill the Enemy, for by that Law the Enemies are of no account; but such Obedience proceeds from the Military Discipline of several Nations. By the *Romans* it was a Law noted by *Modestinus*, That whosoever obeyed not his Orders, should be punished with death, though the matter succeeded well: Now he also was supposed not to have obeyed, who out of Order without the Command of the General entered into any Fight. For if such liberty were lawful, either Stations would be de-

serted;

ferred, or (licence proceeding) the Army, Fleet, or Squadron would be engaged in unadvised Battels, which by all means is to be avoided. *M. Capello*, a Venetian Gentleman of an ancient Extraction, having the Charge of the Guarding of the Venetian Gulph*, met with the *Barbary Fleet*, whom he so assaulted, that he burnt and took divers of them; amongst the rest the *Admiral Galley of Algier* (a Vessel of vast bigness) which he brought with him away, and she remains at this day a *Trophy* in the *Arsenal* of Venice; the Service, although Noble and Honourable, and such as brought renown to the Republick, yet in regard it was an Action exceeding his Commission, he was adjudged to punishment: (but his great Merit and Alliance preserved his Life) such an exact Obedience that *Signory* expects to be paid to her Orders, be the Success never so glorious. And by the Eleventh Article †, Every Captain, Commander, and other Officer, Seaman or Soldier of any Ship, Frigate, or Vessel of War, are duly to observe the Commands of the Admiral or other his Superior, or Commander of any Squadron, as well for the assault and setting upon any Fleet, Squadron, or Ships of the Enemy, Pirate or Rebels, or joyning Battel with them, or making defence against them, as all other the Commands of the Admiral or other his Superior Commander, the disobeying of which subjects him to the pains of Death, or such other Punishment as the Quality or Neglect of his Offence shall deserve.

The Order of Battel is to be preserved, and in all cases they are to endeavour to keep in one line as much as may be; and though they have beaten some of the Enemy, yet must they not pursue a small number, before the main of the Enemy be beaten or run. Nor ought they in chasing, chase beyond sight of the Flag, and at night all chasing Ships are to return to the Flag. *Instr. 22, 23. in May 1. 1666.*

* History of the Republick of Venice, fol. 170, 171. † Artic. 11.

XV. Again, Every Captain and all other Officers, Mariners and Soldiers of every Ship, Frigate, or Vessel of War, shall not in time of any Fight or Engagement withdraw or keep back; but on the other hand, they are to come into the Battle, and engage, and do their utmost endeavour to take, fire, kill, and endamage the Enemy, Pirate or Rebel, and assist and relieve all other his Concomerate Ships; and if they shall prove Cowards, they are to be dealt with as Cowards ought by the Law of Arms, which is to suffer Death: But circumstances of things may make alteration of Matters, therefore there is added other punishment, as the circumstance of the Offence

Artic. 12.

Offence shall deserve, or a Court Marshal think fit. By the word Captain the General or Admiral is not included, but all Flag-Officers and others under them, are within the purview of the Statute by the denomination of the word

*In milite unio-
fors est, in Im-
peratore uni-
versorum peri-
culum: unus
homo pluris fu-
it quam uni-
versa civitas.*

*Clearchus Cyro
dedit consilium;
ne ipse se in pe-
riculum offerret
sed inspectorem
se pugna gere-
ret; pugnantem
enim corpore
nil magni effi-
ceret, si verò
quid damni ac-
ceperit, omnes
se perditurum
quos secum ha-
beret. Polyb.*

Stra. lib. 2.

*† Guicciard. l.
3. Apher. 28.*

*Cicero Offic. 1.
¶ 2.*

*Grotius de Jure
Belli ac Pacis,
l. 1. c. 2. §. 1.*

*Misericordia
infortuniis de-
betur: at qui de-
liberat à scien-
tia malè agit,*

Captain, &c. and the Reason wherefore such Commanders in Chief are not within the Law, is, because the Weapon of a General is his Truncheon, but of all other Officers is the Sword; a General is only to command, and the rest to execute, for in the latter is the danger only of one Man's life, but in the first is the hazard of all; therefore by the Law of Arms no General or Admiral in Chief ought to expose their Person to apparent Peril, but in case of a general Overthrow and manifest Defeat. Peter Capponi, the Famous General for the Florentines besieging Soiana, and encamping on the River Casina; † being in a Place of danger, extremely industrious about planting his Battery, was shot with a Harquebuss, immediately upon which the Siege was raised; yet on the other hand, let it be examined where any famous Battel hath been obtained, and the same was not got, not only by the Conduct, but likewise by the single and personal Courage of the General.

There are some Offices to be done, even to them from whom you have received an Injury; for Revenge and Punishment must have a measure; and therefore the Issues of the Roman Wars were either mild or necessary: Now when killing is just in a just War, according to internal Justice, may be known by examining the Causes or End of the War, which may be for the Conservation of Life and Members, and the keeping and acquiring of things useful unto Life; now in the assaulting of Ships, it happens that one is slain on purpose or without purpose; on purpose can no man be slain justly, unless either for just punishment, as if without it we cannot protect and defend our Life, Goods, and Country, &c. That such Punishment may be just, it is necessary that he who is slain have offended, and that so much as may be avenged with the punishment of Death in the Sentence of an equal Judge. Now we must note, between full Injury and mere Misfortune often intercedes some mean, which is as it were composed of both, so that it can neither be called the Act

of one knowing and willing, not merely the act of one ignorant or unwilling.

This Distinction by *Themistius* is fully illustrated: You have made a difference betwixt an Injury, a Fault, and a Misfortune; although you neither study *Plato*, nor read *Aristotle*, yet you put their Doctrine in practice; for you have not thought them worthy of equal punishment, who from the beginning perswaded the War, and who afterward were carried with the stream, and who at last submitted to him, that now seemed to have the highest Power; the first you condemned, the next you chastised, the last you pitied. Most certain, to spare Captives or Prisoners of War, is a command of Goodness and Equity; and in Histories they are often commended, who when too great a number prove burdensome or dangerous, chose rather to let them all go than to stay them, or detain them, though for Ransoms; as in the last *Flemish Wars* with *England*. So for the same causes, they that strike or yield up themselves are not to be slain, (though there is no Provision made by Covenant.) In Towns besieged it was observed by the *Romans*, before the *Ram* had smitten the Wall; *Cæsar* * denounceth to the *Aduatici*, he would save their City, if before the *Ram* had touched the Wall, they yielded; which is still in use in weak Places, before the great Guns are fired; in strong Places, before an Assault is made upon the Walls; and at Sea, by firing one or two Guns, or hanging out the Bloody Flag, according as the Instructions are; however till there be an absolute yielding or quarrer cryed, by the *Law of Arms*, as well as the abovementioned Article, every Commander and Soldier is to do his utmost to take, fire, kill, and endamage the Enemy, or whatsoever may tend thereunto.

non infelix, sed injustus: And Cicero hath a Saying out of Demosthenes; We must shew compassion to those whom Fortune, not their own Deeds, have made miserable.

*Scipio Emilianus at the Overthrow of Carthage, proclaimed that they should fly that would. Polybius, vide Tacitus Annal. 12. Vide Serran. in reb. Franc. 1. & Hen. 2. Thucyd. lib. 3. * Cæsar lib. 2. de bello Gallico. † Dinant in Germany being taken by Assault, the Town was razed and burnt, and the*

Prisoners all put to Death. *Vide Phil. Comin. lib. 2. cap. 13*

XVI. By the *Law of Arms*, he deserves punishment who doth not keep off force that is offered to his fellow Soldier; and though it hath been conceived, if there be manifest danger, that he is not bound to come in to his Relief; for such Commander may prefer the lives in his own Ship before those in another, yet that suffices not; every Soldier by the *Law of Arms*, is not only bound

I will defend my Companions on at the hazard

of my own
Blood, and
partake in his
danger. *Senec.
de Ben. 2. 15.*

Artic. 13.

to defend, but also to assist and relieve his Companion: now Companions are in two respects, either those that are in actual service with such Soldiers, or those that are not, but only committed to their Protection or Convoy, which are to be defended and guarded at the same peril and charge that a fellow Soldier is; and therefore all Ships that are committed to Convoy and Guard, They are diligently and carefully to be attended upon without delay, according to their Instructions, in that behalf: And whosoever shall be faulty therein, and shall not faithfully perform the same, and defend the Ships and Goods in their Conboy, without either diverting to other parts or occasions, or refusing or neglecting to fight in their defence, if they be set upon, or assailed, or running away cowardly, and submitting those in their Conboy to Hazard and Peril, or shall demand or exact any Money or other Reward from any Merchant or Master, for conveying of any such Ships or other Vessels belonging to His Majesty's Subjects, shall be condemned to make reparation of the Damage to the Merchants, Owners, or others, as the Court of Admiralty shall adjudge, and also be punished criminally according to the quality of their Offences, be it by Pains of Death or other Punishment, according as shall be adjudged fit by that Court Marshal.

*Etiam hujus
rei in feris i-
mago quædam.
Leo in Adul-
teræ pœnam
confurgit.
Plin. Hist.
Nat. 8. 16.*

Protection of Convoys by the *Laws of Nations*, is of a great Utility to a Kingdom or State; therefore when Violence is offered to those Ships under Convoy, they are not said to be done to them, but to those Ships of War under whose Guard they pass; and therefore when Violence is offered to such, publick Revenge is let in, according to that of *Tacitus*, *He should provide for their Security by a just Revenge*. Now that such Ships may not suffer Wrong from their Invaders, two ways may be taken by their Convoys: first, by destroying him or them that shall have attempted and committed any hostile Act against any thing under their Protection; secondly, by all ways imaginable endeavour the weakning his or their Force, that he or they may not be able to do any other or further Hurt; therefore there is no doubt but Vindication to these Ends is within the Bounds of Equity, though this is no more than private; yet if we respect the bare Law of Nature, abstract from Laws Divine and Humane, and

and from all not necessary Accidents to things, it is not unlawful, whether the Satisfaction or Revenge is taken by Convoy Ships themselves, or the wronged ones under his or their Guard or Protection, seeing it is consentaneous to Nature, that Man should receive Aid from Man; and in this Sense may be admitted that saying of Cicero; *The Law of Nature is that which comes not from Opinion, but innate Vertue*: Among the Examples of it is placed *Vindication*, which he opposes to Favour; and that none might doubt how much he would have understood by that name, he defines *Vindication*, *whereby, by defending or revenging, we keep off Force and Contumely from us and ours, who ought to be dear unto us, and whereby we punish Offences*.

Now those Ships that are not under Convoy, but engaged in Fight, are faithfully to be relieved; and therefore if a Squadron shall happen to be over-charged and distressed, the next Squadron or Ships are to make towards their relief and assistance upon a Signal given them; which is generally given in the *Admiral's* Squadron by a Pendant on the Fore-top-mast-head of any Flag-Ship; in the *Vice-Admiral's* Squadron, or he that commands in Chief in the second place, a Pendant on the Main-top-mast-head; and the *Reer-Admiral's* Squadron the like; but these Signals sometimes change, according to the Wisdom and Resolution of the *Admiral*. Again, Ships that are disabled by loss of Masts, shot under Water, or the like, so as they be in danger of sinking or taking, the distressed Ships generally make a Sign by Wast of their *Jack* and *Ensigns*, and those next to them are bound to their Relief: but yet this does not always hold place; for if the distressed Ship is not in probability of sinking, or otherways encompassed with the Enemy, the Reliever is not to stay under pretence of securing them, but ought to follow his Leader and the Battle, leaving such lame Ships to the Sternmost of the Fleet, it being an undoubted Maxim, *That nothing but beating the Body of the Enemy can effectually secure such disabled Ships*.

XVII. It is not enough that Men behave themselves valiantly in the beating of an Enemy, for that is not all, but the reducing of them into a condition to render right either for Damage done, or to render that which is right; which can't well be done without bringing him to Ex-

Artic. 14.

But that is to be understood as in the 12 S. of this Chapter.

gences and Straits ; and therefore if the Enemy, Pirate, or Rebel be beaten, ~~None~~, neither through Cowardize, Negligence ; or Disaffection, ought to forbear the pursuit, and those of them flying ; nor ought such either through Cowardize, Negligence, or Disaffection, forbear the assisting of a known Friend in view, to their utmost Power, the Breach of which subjects the Offenders to the Pains of Death, or at least such Punishment as a Court Marshal shall think fit.

Empires are got by Arms, and propagated by Victory ; and by the *Laws of War*, they that have overcome, should govern those they have subdued. Hence it is, that Generals having compleated a Conquest in a just War, and in chase or otherwise have taken the Ships or Goods of the Enemy, have absolute Power over the Lives, Estates, Ships and things that they by Force of Arms have acquired by the *Laws of Nations*.

But yet in such Conquests where the reeking Sword knows no Law, that is, they are done *impune*, without Punishment, (because co-active Judges do grant them their Authority) yet such Power may be exorbitant from that Rule of Right called *Virtue* ; and though by the *Law of War* Captives may be slain, yet what Law forbids not, Modesty prohibits to be done. Hence it is that Generals do often restrain that Power of killing ; for though such Prisoners of War do fight for the Maintenance of an unjust Cause, and although the War is begun by a solemn Manner ; yet all Acts that have their rise from thence, are unjust by internal Injustice, so that they who knowingly do persist in fighting, * yet ought they not always to be slain, according to that of *Seneca* : *Cruel are they*, says he, † *that have Cause of Punishment, but have no measure*. For he that in punishing goes further than is meet, is the second Author of Injury ; and the principal Reason why Mercy is often shewed, is for that Soldiers of Fortune offend not out of any Hatred or Cruelty, but out of Duty.

XVIII. Again, *Generals* in the Measure of killing, look commonly no further than the Destruction of those who by Force of Arms oppose them ; and though Ships or Cities are taken by Assault, the which by the Laws of War subjects every individual to the Mercy of the Conqueror,

Tacit. 3. *Annal. Pompeius gravior remedium quum delicta erant.*

* Grot. de *Jure Belli ac Pacis*, l. 3. c. 10. §. † 2. de *Clem.* cap. 4.

querour, yet Children, Women, old Men, Priests, Scholars, and Husbandmen are to be spared; the first by the Law of Nature, according to that of Camillus: *We have Arms, says he, not against that Age which even in taking Cities is spared, but against armed Men:* and this is the Law of Arms amongst good Men; by which we are to note, that by the Words *good Men*, as is observed, we mean the Law of Nature, for strictly by the Law of Arms, the Slayers of them are without Punishment.

*In Vita Ca-
milli. Liv. lib.
1, & 5.*

*Grotius de Ju-
re Belli ac Pa-
cis, lib. 3. cap.
11. who ob-*

serves, that many Pretences may be found out against Men of mature Age, but against Infants, Calumny it self can find nothing to say, as being clearly Innocents.

Now that which hath always place in Children that have not attained the use of Reason, for the most part prevails with Women; that is, unless they have committed something peculiarly to be avenged, or do usurp manly Offices, as flinging of Stones from the Walls, pouring down burning Pitch, Brimstone, and the like bituminous Stuff, firing of Guns, and the like; for it is a Sex that hath nothing to do with the Sword, that are capable of that Clemency.

*Herod. in Vi-
ta Maximin.
fol. 417.*

The like for Old Men, who, *Papinius* observes, are not to be slain; so for Ministers of sacred things, even barbarous Nations have had them in Reverence and Preservation; as the *Philistines*, Enemies of the *Jews*, did to the College of Prophets, to whom they did no Harm: and with those Priests are justly equalled in this respect, they that have chosen a like kind of Life, as *Monks* and *Penitents*, whom therefore as well as Priests, the *Canons* following in natural Equity will have spared: * to these * are deservedly added those that give themselves to the study of good Learning and Sciences useful to Mankind, be it in *Universities*, or other publick Schools or Colleges. But yet if any of these be taken in actual Service, they then may receive the common Fate of others. So our King *Richard* the First, having taken the Martial Bishop of *Beauvais* Prisoner, received a Letter from the Pope, that he should no longer detain in Custody his dear Son; the Knig sent the Pope back the Armour wherein he was

*Papin. nullis
violabilis armis
turba senes.
Vitt. D. loco.
1 Sam. 10. 5.
& 1 Sam. 19.
18.
* Lord Coke's
Comm. on
30 Cap. of
Magna Charta
fol. 58. C. de
Guerra & Pace*

taken, with the Words of *Jacob's Sons* to their Father,
See whether or no this be the Coat of thy Son.

Leg. execut. C.
qua res pign.

Vide 2. Instit.
fol. 58, &
Trin. 21 E. 1.
coram Rege
Ror. 127.

De Benefic. 5.
cap. 18.

Libertinum in-
gratum in pri-
vatam redigit
servitutem.
Fortescue cap.
46.

Liv. lib. 28.
The same
said Julian
in Nicetas.

Grotius de Fu-
re Belli ac Pa-
cis, lib. 3. cap.
41.

To these are added Tradesmen, so likewise Merchants, which is not only to be understood of them that stay for a time in the Enemy's Quarters; (but of perpetual Subjects) for their Life hath nothing to do with Arms, and under that Name are also contained other Workmen and Artificers, whose Gain loves not War but Peace.

Again, Captives, and those that yield, are not to be slain, for to spare such is a Command of Goodness and Equity, says *Seneca*; however it may so come to pass, that though the military Power may exempt a Prisoner of War from the Execution of the Sword, yet it may be out of their Power to exempt or discharge a Delinquent or Traitor from the Execution of the Magistrate, as if the Fleet were prepared, and the War principally begun for the Suppression of such; and the Reason of this is, if it should be in the Power of one Soldier, who takes a Traitor Prisoner upon such Terms, it would *pari ratione* be in the Power of all to pardon; not that the Article hath no effect, for the Traitor is by that freed from the immediate Execution of the Sword: Sure it is, that if the yielding be in *aperto prælio*, methinks absolute Pardon is implicitly in the Contract; however this is undeniable, that having yielded himself Prisoner of War, if he escape, he for ever loses the Benefit of the Promise. Nor are Hostages to be destroyed, according to that of *Scipio*, who said: *He would not shew his Displeasure on harmless Hostages, but upon those that had revolted; and that he would not take Revenge of the unarmed, but of the armed Enemy.*

'Tis very true by the Law of Arms, if the Contract be broke for which they became Hostages, they may be slain, that is, the Slayer is without Punishment: But yet some conceive the Slayer is not without Sin, for that no such Contract can take away any Man's Life; that is, I suppose, an Innocent's Life; but without Controversy, if those that become Hostages be, or were before, in the number of grievous Delinquents, or if afterwards he hath broken his Faith given by him in a great Matter, the Punishment of such may be free from Injury.

XIX. Where Offences are of that nature as they may seem worthy of Death, as Mutiny, and the like, &c. it will be a Point of Mercy, because of the multitude of them, to remit extreme Right, according to that of *Semeca*: The Severity of a General shews it self against Particulars, but Pardon is necessary when the whole Army is revolting: What takes away Anger from a wise Man? the multitude of Transgressors. Hence it was, that casting of * Lots was introduced that too many might not be subjected to punishment.

2 de Ira cap. 10. Quicquid multis peccatur multum est. Magis non ideo quam imitando: sic enim agendum est cum

*multitudini peccantium, severitas autem exercenda est in peccata paucorum. Vide alium de Pace. publ. lib. 11. cap. 9. 36. * Vide Grot. lib. 3. cap. 11. §. 17.*

However all Nations have generally made it a standing Rule in the Punishment of Mutineers, as near as possible, to hunt out the Authors, and make them Examples †.

† Vitor de Jure Belli, n. 55. lib. 2.

And therefore by the 15 Article. If any Man at any time, when Service or Action is commanded, shall presume to stop, or put backwards or discourage, the said Service and Action, by pretence of Arrears of Wages, or upon any pretence of Wages whatsoever, they are to suffer Death; and indeed the same ought to be without Mercy, by how much the more they may raise a Mutiny at a time when there is nothing expected but an Action, and the shewing the most obsequious Duty that possibly may be; the Breach of which may occasion the Damage of the whole Fleet, and being of such Dangerous Consequence, ought to be severely punished. *Gustavus Adolphus* upon his first entrance into *Germany*, perceiving how that many Women followed his Soldiers, some being their Wives, and some wanting nothing to make them so but Marriage, yet most passing for their Landresses (though commonly defiling more than they wash) the King coming to a great River, after his Men and the Waggon's were passed over, caused the Bridge to be broken down, hoping so to be rid of these feminine Impediments; but they on a sudden lift up a panick Shriek which pierced the Skies, and the Souldiers Hearts on the other side of the River, who instantly fell into Mutiny, vowing not to stir a Foot further except with Baggage, and that the Women might be fetched over, which was done accord-

Artic. 15.

Artic. 19.

Artic. 34.

Artic. 20.

Grotius de Ju-
re Belli ac
Pacis. l. 3. c.
1. S.

* Leg Trans-
fug. de acqu.
dom. Polyb. in
excerp. Legat.
9. 28. 34.
Menand. Pro-
rector idem
nos docet.
† Phil. Comin.
lib. 4. cap. 12.

Artic. 16.

ingly ; for the King finding this ill Humour so generally dispersed in his Men, that it was dangerous to purge it all at once, smiled out his Anger for the present, and permitted what he could not amend. So likewise the uttering any Words of Sedition or Mutiny, or the endeavouring to make any mutinous Assemblies upon any Pretence whatsoever, is made Death : And the very Concealers of any traiterous and mutinous Practices, Designs, or Words, or any Words spoken by any to the Prejudice of His Majesty or Government, or any Words, Practices, or Designs tending to the Hindrance of the Service, and shall not reveal them, subject them to such Pains and Punishments as a Court Marshal shall think fit.. And whereas in any of the Offences committed against any of the Articles for the Government of any of His Majesty's Ships of War, within the narrow Seas, wherein the Pains of Death are to be inflicted, Execution of such Sentence ought not to be made without leave of the Lord Admiral ; this of Mutiny is totally excepted, for such may be executed immediately.

XX. It is not lawful for Princes or States to make of their Enemies Traitors, or cause them to desert the Service of their Prince, or to bring over their Ships, Ordnance, Provisions, or Arms ; for as 'tis not lawful for any Subject to do the same, so neither to tempt him ; for he that gives a Cause of sinning to another, sins also himself ; but if a Man will voluntarily, without any other Impulse than his own, bring over the Ships or Armies, or deserts the Service of his Prince to serve another, this, though a Fault in the Deserter, is not in the Receiver : We receive a Fugitive by the Law of War, (saith * Celsus) that is, it is not against the Law of War to admit him, who having deserted his Prince's part, elected his Enemy's ; nor are such to be rendred, except it shall be agreed, as in the Peace of † Lewis the Eleventh. However such sort of Gamesters, if caught, are to be severely punished ; and therefore it is provided, That if any Sea-Captain, Officer, or Seaman, shall betray his Trust, or turn to the Enemy, Pirate, or Rebel, or run away with their Ship or Ordnance, Ammunition, or Provision, to the weakening of the Service, or yield the same up to the Enemy, Pirate or Rebel, they shall be punished with Death ;

Death; so likewise, If any desert the Service, or the Employment which they are in on Shipboard, or shall run away or entice any other so to do, they are subject to the like pain of Death. And by the Law of Nations, such Deserters that run away from their Colours or Fleet before Peace proclaimed and concluded, all Persons of that Prince from whom they fled, have a Right indulged to them to execute publick Revenge.

Artic. 17.
Tertul. Apol.
9. c. quando
liceat, l. 2. in
reos majestatis
& publicos ho-
stes omnis ho-
mo miles. Vida

de lib. 1. cap. 5. Vide Hatly Rep. 235. 7 H. 7. cap. 1. 3 H. 8. cap. 5. Hutt. 134.

XXI. By the Laws of Nations, Spies may be sent to view and survey the Enemy's Force, Fleet, Station, and make discovery of whatsoever may give Advantage to the Persons sending, as is mentioned above; but being apprehended they are put to Death; and therefore if any Person shall come from or be found in the nature of spies, to bring any seducing Letters or Messages from any Enemy or Rebel, or shall attempt or endeavour to corrupt any Captain, Officer, Mariner, or other of the Navy or Fleet, to betray his or their Trust, or yield up any Ship or Ammunition, or turn to the Enemy or Rebel, he shall be punished with Death.

Liv. l. 2. c. 3.
S. ult. ad Leg.
Corn. de Sicar.
pun.

Artic. 18.

XXII. Soldiers and Mariners owe all Respect and Duty to their Superior Officers; and therefore when they are in Anger, they ought to avoid them: But above all not to quarrel with, or give them any provoking Language: And therefore by the Law of Arms, a Soldier who hath resisted his Captain, willing to chastise him, if he hath laid hold on his Rod, is cashier'd, if he purpose to break it, or laid violent Hands upon his Captain, he lies: * And by the Laws of England, if any Person shall presume to quarrel with his superior Officer, he shall suffer severe Punishment; and if he strikes him, he shall suffer Death, or otherwise as a Court Marshal shall adjudge the Matter to deserve †

** Leg. milit.*
D. de re milit.
Rufus Leg. mi-
litar. cap. 15.

† Artic. 21.

XXIII. And though Mariners and Soldiers may have just Cause of Complaint, as that their Victuals or Provisions are not good, yet must they not mutiny or rebel, whereby to distract or confound the whole Crew, but must make a civil and humble Address to their Commander, that the same may be amended; and if the Case

Bacon's Max-
im fol. 17.
Privilegium
non valet con-
tra rempubli-
cam.

Artic. 22.

Case be such, that the Commander cannot redress the same, by going to Port to supply the Exigencies, without Detriment of the Fleet, (as if ready to engage, or the like) they must, like Men and Soldiers, bear with the Extremity, considering that 'tis better that some Men should perish, nay the whole Crew in one Ship, than the whole Fleet; nay, perhaps the whole Kingdom be destroyed: And therefore if any in the Fleet find Cause of Complaint of the Unwholsomness of his Victuals, or upon other just ground, he shall quietly make the same known to his Superior or Captain, or Commander in Chief, as the Occasion may deserve, that such present Remedy may be had, as the matter may require; and the said Superior or Commander is to cause the same to be presently remedied accordingly; but no Person upon any such or other Pretence, shall privately attempt to stir up any Disturbance, upon pain of such severe Punishment as a Court Marshal shall think fit to inflict.

Artic. 24.

XXIV. And as the Law doth provide that there be no waste or spoil of the King's Provision, or imbezlement of the same; so likewise that care be taken, the Ships of War neither through Negligence or Willfulness be stranded, split or hazarded, upon severe Penalties. In Fights, and when great Fleets are out, there are generally Instructions appointed for all Masters, Pilots, Ketches, Hoyes, and Smacks, who are to attend the Fleet, and to give them notice of the Roads, Coasts, Sands, Rocks, and the like; and they have particular Stations allotted them, and Orders given, that if they shall find less Water than such a proportion, they then give a Signal as they are directed to give, and continue their Signal till they are answered from the Capital Ships.

But in time of Fight they generally lay away their head from the Fleet, and keep the lead; and if they meet with such a Proportion of Water as is within their Directions, they are to give such Signal as they receive Orders for, and stand off from the danger; but the wilful burning of any Ship or Magazine-store of Powder, Ship-boat, Ketch, Hoy, or Vessel, or Tackle, or Furniture thereunto belonging, not appertaining to an Enemy or Rebel, shall be punished with Death.

XXV. There are other faults often committed by the Crew

Crew, the which the Law does punish, as a quarrelling on ship board, using provoking speeches tending to make *Artic. 23.* quarrel or disturbance, Murthers, wilful killing of any *Artic. 28.* Man, Robbery, Theft, and the unnatural Sin of So- *Artic. 29.* mity and Buggary, committed with Man or Beast: all which, and all other Faults and Misdemeanours are punished with Death, or according to the Laws and Customs in such cases used at Sea; and when any Persons have *Artic. 33.* committed any of the Offences particularly mentioned in the Statute of 13 Car. 2. Cap. 9. and contained in the Articles, or any others, and for the which they shall be committed, the Provost Marshal is to take them into *Artic. 31.* custody, and not suffer them to escape, and all Officers and Seamen are to be aiding and assisting to Officers for the detecting and apprehending of Offenders.

Touching the Punishments that the Roman Generals used to their Soldiers, when they were at a Court Marshal found faulty, they were commonly proportioned according to the Offence committed: Sometimes they were easie, of which sort were those which only branded the Soldier with disgrace; others were those that came heavy on the person or Body. To the first belonged a shameful discharging or cashiering a Mariner or Soldier from the Army, *ignominiosa dimissio.* and generally lookt on as a matter of great disgrace, which punishment remains at this day for offences as well in England, as in most parts. A second was by stopping of their pay; such Soldiers which suffered this kind of mulct, *Fraudat stipendium, dicitur. Rosin. Ant. Rom. l. 10. c.* were said to be *Are diruti*, for that *Es illud diruebatur* *25.* *officium, non in Militis sacculum*; the which is and may at this day be inflicted, especially on such as shall wilfully spoil their Arms, and for the like sort of offences. A third was a Sentence enjoyned on a Soldier to resign up his spear; for as those which had archieved any Noble Act were for their greater Honour *Hostia pura donati*, so others for their greater disgrace were enforced to resign up that Military Weapon of Honour. A fourth sort of punishment was, that the whole Cohort, which had lost their banners or Standards, either in the Fields or at Sea, were enforced to eat nothing but Barley-bread, being deprived of their allowance in Wheat, and every Centurion in that Cohort had his Soldiers Belt or Girdle taken from him, which

Goodwin *Antiq. Rom. fol.*
127.

which was no less disgrace among them than the degrading (among us) one of the *Order of the Garter*: for petty Faults they generally made them stand bare-footed before the *General's Pavilion*, with long Poles of Ten Foot in length in their Hands, and sometimes in the sight of the other Soldiers to walk up and down with Turff, on their Necks, and sometimes carrying a Beam like a Fork upon their Shoulders round the Town. The last of their Punishments was, the opening of a Vein or letting them Blood in one of their Arms, which generally was inflicted on them who were too hot and bold.

Lips. de milit. Rom. lib. 5. Dialog. 18.

The great Judgments, were to be beaten with Rods, which was generally inflicted on those who had not discharged their Office, in the sending about that Table called *Tessera*, wherein the Watch word was written, or those who had stoln any thing from the Camp, or that had forsaken to keep Watch, or those that had born any false Witness against their Fellows, or had abused their Bodies by Women, or those that had been punished thrice for the same Fault, sometimes they were sold for Bond-slaves, beheaded and hanged. But the last which was in their Mutinies, the punishment fell either to Lots, as the Tenth, Twentieth, and sometimes the Hundredth Man, who were punished with Cudgelling; and with these Punishments those in *England* have a very near affinity, as cleansing the Ship, losing Pay, ducking in the Water, beaten at the Capsonshead, hoisted up the main Yard end with a Shovel at their Back, hanged, and shot to Death and the like.

37. H. 6. fol.
4. 5.

13 Car. 2.
cap. 9.

XXVI. The *Admiral* may grant Commissions to inferior *Vice Admirals* or *Commanders in Chief* of any Squadron of Ships, to assemble *Court Marshals*, consisting of *Commanders* and *Captains*, for the Trial and Execution of any of the Offences or Misdemeanors which shall be committed at Sea; but if one be attainted before them the same works no corruption of Blood or forfeiture of Lands, nor can they try any Person that is not in actual Service and Pay in His Majesty's Fleet and Ships of War. But in no case where there is Sentence of Death can the Execution of the same be without leave of the *Lord Admiral*, if the same be committed within the narrow Seas

et this does not extend to Mutiny, for there in that case the Party may be executed presently.

All Offences committed in any Voyage beyond the narrow Seas where Sentence of Death shall be given upon any of the aforesaid Offences, Execution cannot be awarded nor done, but by the Order of the Commander in Chief of that Fleet or Squadron, wherein Sentence of Death was passed.

XXVII. The Judge Advocate hath Power given by the words of the *Statute*, to administer an Oath in order to the Examination or Trial of any of the Offences mentioned in the *Statute* of 13 Car. 2. Cap. 9. and in his absence the *Court Marshal* hath power to appoint any other person to administer an Oath to the same purpose. This *Statute* enlarges not the Power and Jurisdiction of the *Admiral* any further than only to the abovementioned Offences in any case whatsoever, but leaves his Authority as it was before the making of this *Statute*. Nor does it give the *Admiral* any other or further Power to enquire and punish any of the above-mentioned Offences, unless the same be done upon the main Sea, or in Ships or Vessels being and hovering in the main Stream of great Rivers only beneath the Bridges of the same Rivers nigh to the Seas, within the Jurisdiction of the Admiralty, and in no other place whatsoever.

15 R. 2. cap. 3.

XXVIII. As Soldiers and Mariners for the Honour and safety of the Realm, do daily expose their lives and limbs to the Realm, hath likewise provided for them, in case they survive and should prove disabled or unfit for Service, a reasonable and comfortable maintenance to keep them; the which the Justices of the Peace have power yearly in their *Easter Sessions* to raise by way of a Tax, for a weekly relief of maimed Soldiers and Mariners.

Stat. 43. Eliz. cap. 3. & Vide 13, 14. C. 2. c. 9. 7, 8 W. 3. c. 21. 2, 3. A. c. 6. where by Provision is made for the Widows and Orphans.

The maimed Soldier or Mariner must repair to the *Treasurer* of the County where he was prest, if he be able to travel; if he be not, then to the *Treasurer* of the County where he was born, or where he last dwelt by the space of Three Years; but if he prove unable to travel, then to the *Treasurer* of the County where he lands.

He must have a Certificate under the chief Commander, or of his Captain, containing the Particulars of his Hurt and Services.

The

The Allowance to one not having been an Officer, is not to exceed Ten Pound per Annum ;

Under a Lieutenant ——— 15 3

A Lieutenant ——— 20 3

Till the Mariner arrives at his proper *Treasurer*, they are to be relieved from *Treasurer* to *Treasurer*, and when they are provided for, if any of them shall go a begging or counterfeit Certificates, they shall suffer as common Rogues ; and lose their Pensions ; Over and above this Provision, His Sacred Majesty hath provided a further Suppliment for his maimed Mariners and Soldiers disabled in the Service, which is issued out at the *Chest* at *Chatham*, and constantly and duly paid them ; and for his Commanders, Officers, and others that served abroad, he, of his Royal Bounty, hath given to those that bear the Character of War, and purchase the same by their Fidelity and Valour, a pious Bounty called *Smart-Money*, over and above their Pay ; and laid the Foundation of an *Hospital* at *Chelsea*, in his Life-time, which his now Sacred Majesty hath compleated, and endowed, both for Beauty and Magnificence, excelling all in *Christendom*.

The greatest assurance of a Fleet is in the prudent Government of the *Admiral* ; the greatest weakning of it is by discontent, which generally proceeds from two things ; want of good Victuals at Sea, and Pay when come home, these are the poor Mariners *Aqua vitæ* ; but want of them is such an *Aqua fortis* as eats through all manner of Duty and Obedience : That Prince that expects to be well served and obeyed, (especially by an *English* man) must take care that he suffer not a greater Power in his Fleet than his own ; this Commander is Necessity, which breaks Discipline at Sea, and creates Discouragement at Land.

Vide Salmuth.
In Pancir. L. G.
verum deprad.
Cade. Triumph.
Dien Halicar.
nas. lib. 5.

XXIX. The Wisdom of the *Romans* was mightily to be commended, in giving of *Triumphs* to their *Generals* after their Return, of which they had various sorts ; but the greatest was when the *General* rid in his Chariot, adorned and crowned with the Victorious Laurel, the *Senators* with the best of the *Romans* meeting him, his Soldiers (especially those who by their Valour had purchased Coronets, Chains, and other Ensigns of reward for their Conduct and Courage) following him ; But what alas ! could

could these to the more sober represent any other but horror, since the Centers from whence the Lines were drawn, could afford nothing but Death, Slaughter and Desolation on those who had the Souls and Faces of Men; and if it were possible, that the Blood which by their Commissions was drawn from the sides of Mankind, and for which they made those Triumphs, could have been brought to *Rome*, the same was capable of making of a Source great as their *Tiber*; but *Policy* had need of all its Statagems to confound the Judgment of a Soldier by excessive Praises, Recompences and Triumphs, that to the Opinion of Wounds and wooden Legs might raise in him a greater Esteem of himself, than if he had an entire Body. To allure others, something also must be found out handsomely to cover wounds and affrightments of Death; and without this *Cæsar* in his Triumph, with all his Garlands and Musick, would look but like a Victim; but what sorrow of Heart is it to see passionate Man, a Ray of Divinity, and the Joy of Angels, scourged thus with his own Scorpions? and so fondly to give himself Alarms in the midst of his innocent Contentments, as they of *Holland* but yesterday in the midst of their Traffick and Recreations did (by the denying *His Sacred Majesty* his Right, even that Right of the Flag which his Ancestors had with so much Glory acquired) pull on their heads a War, which that mighty *Republick* by their greatest Industry and Wisdom could not in the Revolution of almost Eight Years be able to quell. The choicerickness of War (whereby the lustful heat of so many Hearts is reduced) stirs up the Lees of *Kingdoms* and *States*, as a Tempest doth weeds and slimy sediment from the bottom to the top of the Sea, which afterwards driven to the Shore, together with its foam, there covers Pearls and precious Stones: and though the Cannon should seem mad by its continual firing, and the Sword reeking hot by its daily slaughters, yet no good man doubts but they, even they, shall weather out those Storms, and in the midst of those merciless Instruments and an *inculcata Tutela*, who love Justice, exercise Charity, and put their Trust in the *Great Governour of all things*.

C H A P. XIV.

Of Salutations by Ships of War, and Merchant Men.

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| <p>I. Of Salutations, how effected by some in this latter Age.</p> <p>II. Of the same paid in all Ages as an undoubted mark of Sovereignty of this Empire.</p> <p>III. Of those Seas where this Right is to be paid to the King of England's Flag.</p> <p>IV. In what manner the King of England holds this Right, and by whom to be paid.</p> <p>V. Of those that shall neglect or refuse to do the same, how punished and dealt withal.</p> <p>VI. Where His Majesty of Great Britain's Ships are to strike their Flag, and where not.</p> <p>VII. Of the saluting of Ports, Castles, Forts, how the same is to be done, and on what terms.</p> <p>VIII. Of Ships of War their saluting their Admiral and Commanders in Chief.</p> <p>IX. Of Embassadors, Dukes, Noblemen, and other Persons of Quality, how to be saluted coming aboard and landing.</p> | <p>X. The Admiral of any Foreign Nation, if met withal, how to be saluted and answered.</p> <p>XI. Of the Men of War or Ships of Trade of any Foreign Nations, saluting His Majesty's Ships of War, how to be answered.</p> <p>XII. Of the saluting of His Majesty's own Forts and Castles, and when the Salute ceases.</p> <p>XIII. Of the Objection that seems to be made against the necessity of such Salutations.</p> <p>XIV. Why Kingdoms and States attribute the effects, not the cause of Rights, to prescription.</p> <p>XV. That Kingdoms and Republicks ought not to be disordered for the defect of Right, in presumption, and the objection in the XIII. S. answered.</p> <p>XVI. The inconveniency of War, and the causes justifying the same.</p> <p>XVII. Of the causes not justifiable in War.</p> <p>XVIII. Of Moderation, and the utility of Faith and Peace.</p> |
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I. AS reforming Powers in all Ages have made it their chiefest work to take down the great Colossuses, and whatever else might be obumbrageous in the excrescences of Civil Pomp; so we had some in this Age, who, by a new art of levelling, thought nothing could be rightly mended, and they planted, unless the whole piece unravelled out to the very end, and that all intermediate greatness between Kings and them, should be crumbled even to the dust, where all lying level together as in the first Chaos, Spades ought even to be put into the hands of those

those who were heretofore adorned with Scepters, all outward Tokens of honour and esteem, which even from the first institution of Society seemed by an uninterrupted stream to be continued down to Posterity, (even amongst the most barbarous Nations) was by them totally denied; the Hand, the Hat, the Knee (being no other but outward signs of an inward respect) being esteemed equal with *Idolatry*; but that unhappy brood, to whom whatsoever was crooked seemed straight, and what was dark to them appeared light, are now not to be accounted Men, with whom the Question may admit of a Debate, whether *Salutation* is innocent, necessary, and praise worthy, since nothing of reason can be found in the Foundation of their Religion, Honesty or Conscience, — Therefore this Discourse is directed to Men.

II. First, it is evident by what hath been said, that the *British Seas* before the *Roman Conquest*, ever belonged to the *Isle of Great Britain*, they always claiming and enjoying the sole Dominion and Sovereignty of the same, which afterwards accrued to the *Romans* by Conquest, and from them translated with its *Empire* to the succeeding *Saxon*, *Danish*, and *Norman Kings*; and in the Reigns of those Princes there were always some marks of Sovereignty paid, wherein the right of the same was evinc'd and acknowledged.

III. Now those Seas in which this Salutation or Duty of the Flag are to be paid, are the four circumjacent Seas, in which all Vessels whatsoever are to pay that Duty, according to the Custom of the same, and the Ordinance of King *John*. How far this Right is payable, appears in the Fourth Article in the Peace made lately between *His Majesty* and the *States General of the United Provinces*, in these words:

— That whatever Ships or Vessels belonging to the said United Provinces, whether Vessels of War or other, whether single or in Fleets, shall meet in any of the Seas from Cape Finisterre the middle point of the Land Van Staten in Norway, with any Ships or Vessels belonging to his Majesty of Great Britain, whether those Ships be single or in great number, if they carry his Majesty of Great Britain's Flag or Jack, the aforesaid Dutch Vessels or Ships shall strike their Flag and lower their

Top-sail, in the same manner, and with as much respect as hath at any time, or in any place, been formerly practised, towards any Ships of his Majesty of Great Britain, or his Predecessors, by any Ships of the States General, or their Predecessors.

IV. Now his Majesty holds not this *Salutation* or Respect, by virtue of the League of the Article, but as the same is a RIGHT inherent to the *Empire of Great Britain*; and therefore in the first part of the Article it is declared in these Words:

— That the aforesaid States General of the United Provinces, in due acknowledgment on their part of the King of Great Britain's R I C H T to have his Flag respected in the Seas hereafter mentioned, shall and do declare, and agree. —

Selden Mare
Clause lib. 2.
cap. 23.

Now this Right extends and subjects all Nations whatsoever that shall pass through those Seas, and between those Places meeting with any of his Majesty's Ships of War, bearing his Flag, Jack, or Cognizance of Service, to strike their Top-sail, and take in their Flag in acknowledgment of his Majesty's Sovereignty in those Seas; and if any shall refuse to do it, or offer to resist, they may be compelled *vi, & manu forti*, for his Majesty's Honour is by no means to receive the least Diminution.

V. If therefore any of His Majesty's Subjects should be so negligent or forgetful to pay that Obedience, when it may be done without loss of the Voyage, they are to be seized on, and brought to the Flag, to answer the Contempt, or else the Commander may remit the Name of the Ship, Commander or Master, as also the Place from whence, and the Port to which she shall be bound, to the Admiral; however, before she is dismissed, she must pay the Charge of the *Shot* that her Negligence or Forgetfulness occasioned, and afterwards may be indicted for the same, and severely punished.

VI. In His Majesty's Seas, none of his Ships of War are to strike to any; and in no other Part is any Ship of His Majesty to strike her Flag or Top-sail to any Foreigner, unless such Foreign Ship shall have first struck, or at the same time have struck her Flag or Top-sail to his Majesty's Ships.

VII. But if any of the King of England's Ships of War, shall

shall enter into the Harbour of any Foreign Prince or State, or into the Road within shot of Cannon of some Fort or Castle, yet such Respect must be paid, as is usually there expected, and then the *Commander* is to send ashore to inform himself what return they will make to his Salute; and that if he hath received good Assurance, that his Majesty's Ships shall be answered Gun for Gun, the Port is to be saluted, as is usual; but without assurance of being answered by an equal number of Guns, the Port is not to be saluted: And yet in that very respect before the Port is to be saluted, the Captain ought to inform himself, how Flags (of the same quality with that he carries) of other Princes have been saluted there, the which is peremptorily to be insisted on, to be saluted with as great Respect and Advantage as any Flag (of the same quality with the Captains) of any other Prince hath been saluted in that place.

VIII. A Captain of a Ship of a second Rate, being neither Admiral, Vice-Admiral, nor Reer-Admiral, at his first coming and saluting his Admiral or Commander in Chief, is to give Eleven Pieces, his Vice-Admiral Nine, and his Reer-Admiral Seven, and the other proportionably less by two, according to their Ranks; but the Commander or Captain of a Ship is not to salute his Admiral or Commander in Chief, after he hath done it once, except he hath been absent from the Flag Two Months.

Artic. 38.

IX. When a Ship of the second Rate shall carry any Embassador, Duke or Noblemen, at his coming aboard he is to give Eleven Pieces, and at his Landing Fifteen; and when he shall carry a Knight, Lady or Gentleman of Quality, at their coming aboard he is to give seven, and at their Landing eleven; and the other Ships are to give less by two, according to their Ranks and Number, of Ordnance.

X. When an Admiral of any Foreign Nation is met with, he is to be answered with the like Number by all the Ships he shall salute; if a Vice-Admiral, the Admiral is to answer him with twelve less; but the Vice-Admiral and Reer-Admiral, and as many of the rest as he shall salute, shall give him the like number; if a Reer-Admiral, then the Admiral and Vice-Admiral to answer him

him with two less ; but if he shall salute the Reer-Admiral or any other, they are to answer him in the like Number.

XI. When a Man of War or Merchant Man of another Nation, or of our own, salutes any of the King's Ships, he is to be answered by two less.

XII. When any of the Captains of his Majesty's Ships shall have occasion to salute any of the King's Castles, he is to give two Guns less than they are directed to give upon saluting their Admiral or Commander in Chief, as aforesaid : But this extends only to time of Peace ; for if War is begun, no Guns ought to be fired in Salutes, unless to the Ships or Castles of some Foreign Prince or State in Amity.

XIII. Those Duties or Obligations being laid on Commanders, consist of two parts ; the one is that ancient prescription, which the *Crown of England* claims by virtue of the Sovereignty of that *Empire* ; the other is but that Respect which is paid as visible Marks of Honour and Esteem, either to Kingdoms or Persons publick or private, to whom these several Commands are to be observed ; and yet in these which are both innocent and harmless of themselves, we want not those, who being empty of all that may be called good, want not malice to start up words, *Wherefore should the Lives of Men, even Christian Men, be exposed to death and slaughter for shadows* (as they call them) Right of Salutation or Complement being no other in their Opinion.

XIV. Admitting therefore that the Evidence of original Compacts and Rights stand at such remote distances from us, that they are hardly discernable, and that the principle of Civil things, as well as natural, is sought for in a Chaos or Confusion ; so that the Evidence of ancient facts *vestigia nulla retrorsum*, there being no infallible marks of their pre-existence (one step doth so confound and obliterate another) and that time it self is but an imagination of our own, an intentional, not a real measure for actions, which pass away concomitantly with that measure of time in which they were done, for which reason we talk of ancient things, but as blind Men do of Colours : Notwithstanding prescription is supposed by most to hold out such an Evidence, that as they say, it ought

to silence all Counterpleas in all Tribunals, and by the present allowance which is indulged to it, it either proves a good or cleanses a vitiated Title; and hath this power in the civil Constitution of the World, that for Quietness sake what it cannot find, we grant it a power to make.

And if we examine all this strictly at the two great Tribunals, the external and the internal, and argue the *usus* of it, as Statesmen and Lawyers do, we can then raise the Argument of it no higher in the external or temporal Court, than only this ——— *That it is very convenient it should have the effects of Right; lest Properties and Dominion of things should be uncertain, and the apparent negligences of Time: Owners should be punished, and Controversies have a speedy end: States looking more after publick repose and quiet than after strickt Virtue; and more after those things which are ad alterum, than that which concerns a Man's own self; for, say they, The Gods look well enough after their own Injuries: States meddle not so much with great Prodigalities as in petty Larcenies, our chiefest Liberty, Priviledges, or Prerogative in this World, consisting only in an uncontrollable Right, which we have to do unto our selves, if we please. Certainly if we plead at the other Tribunal, as conscientious Lawyers, we must give our ultimate Resolution out of that Law, *Quæ incutitur don ære, sed animis*: which is not engraved in Tables of Brass, but in the Tables of our Souls; for the Rules of Law tells us, *Quæ principio vitiantur, ex post facto reconvalescunt*, and that prescription or usu caption (which is but the lapse of so much Time) hath the power to make *Wrong a Right*; yea, to change the morality of an Action, and turn Quantity into Quality: Upon the Result of all which taking for granted, what those stubborn People do hold, that instead of being a right, or a certain Cause or Proof of it, it only makes a shadow or an opinion of right.*

XV. And when we have taken those People by the hand, and with eagerness run with them to the very bottom and end of the line, and there find nothing, we are but in Pompey's Astonishment, when after his Conquest of *Jerusalem*, having with such reverence and curiosity visited the *Sanctum Sanctorum*, and found nothing

Maachiavel's
Discourses,
cap. 11.

thing there but a pair of Candlesticks and a Chair, in which there was no God sitting; yet for all this Mistake, he would not (as *Iosephus* saith) disorder or rob the Temple, which he took by force of Arms, because *the very Opinion of Religion hath something of Religion*; (which made *Jacob* accept of *Laban's* Oath by an Idol) so ought not we for defect of giving the Causes of the Inception of Prescription, or of the Right in Prescription disorder a State or be the occasion of setting of two Nations at enmity; nay, though in Conscience we are satisfied that it contains but the Opinion or Shadow of Right: And as to the involving the Lives of the Innocent, there is no such thing in the matter, for there is not required any thing which they do not owe, nor are they designed to Death; but if the Cause be such, that they that are Innocent must perish, that is, be exposed to Death by their Rulers because they obstinately will not yield that which is right, but will involve the Lives of their innocent Subjects by Force, to defend that which is wrong, such guilty Governours must answer for the Defect of their own evil Actions: on the other hand, there can be no doubt made, but he that hath an undoubted Right, being a Sovereign, the Subjects partake in the same, and the Indignity offered to him, they immediately become Partakers in the Suffering, for the Satisfaction of which they may, yea, are obliged both by the Law of God and Nations to seek Reparation (if their Prince shall command) *vi, & manu forti*, by the Hazard of their Blood and Lives.

XVI. on the other Hand, as War introduces the greatest of Evils, *viz.* the taking away of Men's Lives, and that which is equivalent to Life; so right Reason and Equity tells us, that it ought not to be undertaken without the greatest Cause, which is the keeping of our Lives, and that without which our Lives cannot be kept; or if they should be kept, yet they would not be of any value to us, seeing there may be a Life worse than Death, even Captivity; wherefore as we are forbidden to go to Law for a little Occasion, so we are not to go to War but for the greatest. Now those things that are equivalent to a Man's Life, are such to whom *Almighty God* appointed the same equal Punishment as to Murderers, and such were breakers into Houses, breakers of Marriage-fidelity, Publish-

ers

ers of false Religion, and those who rage in unnatural Lusts, and the like.

However, before Men's Persons or Goods are to be invaded by War, one of these three Conditions is requisite.

1. Necessity, according to the tacite Contract in the first dividing of Good, as hath been already observed.

2. A Debt.

3. A Man's ill Merits, as when he doth great Wrong, or takes part with those who do it.

Against which if any thing is committed, War may be commenc'd nor is the same repugnant to the Laws of Nature; that is, whether the thing may be done not unjustly, which hath a necessary Repugnance to the rational and social Nature; amongst the first Principles of Nature, there's nothing repugnant unto War; on the other hand there is much in favour of it, for both the end of War, the Conservation of Life and Members, and the keeping and acquiring of things useful unto Life, is most agreeable to those Principles; and if need be, to use Force to that Purpose is not disagreeable, since every living thing hath by the Gift of Nature Strength, to the end it may be able to help and defend it self. Besides, Reason and the Nature of Society, inhibits not all Force, but that which is repugnant to Society, that is, which depriveth another of his Right; for the end of Society is, that every one may enjoy his own; this ought to be, and would have been, though the Dominion and Property of Possessions had not been introduced; for Life, Members and Liberty would yet be proper to every one; and therefore without Injury could not be invaded by another: To make use of what is common, and spend as much as suffices Nature, would be the right of the Occupant, which Right none could without Injury take away. And this is proved by that Battle of *Abraham* with the four Kings, who took Arms without any Commission from *G O D*, and yet was approved by him; therefore the Law of Nature was his Warrant, whose Wisdom was no less eminent than his Sanctity, even by report of *Heathens*, *Berosus* and *Orpheus*; nor is the same repugnant to the He-

*Ulpian Leg. 1.
Sect. vim. vi.
D. de vi, &
vi arma.*

* *De Jure Bel-
li ac Pacis, lib.
1. cap. 1.*

brew Law or Gospel, as the same is most excellently prov-
ed by the *Incomparable Grotius* *.

*Victor. de Ind.
rel. 1. n. 31.*

*Victor de Jure
Bellin. 5,
6, 7, 8.*

XVII. On the other hand, the Fear of uncertain Danger, as building of Forts, Castles and Ships, and the like, though the former be on Frontiers, the refusing of Wives (when others may be had) the changing of Countries either Barren or Moorish for more fertile or healthful which may justly be done: As in the Case of the old *Germans*, as *Tacitus* relates: So likewise to pretend a Title to a Land, because it was never found out or heard of before; that is, if the same be held by a People that are under a Government; nay, though the Government be wicked or think amiss of GOD, or be of a dull Wit; for Invention is of those things that belong to none; for neither is moral Virtue, or Religion, or Perfection of Understanding required to Dominion; but yet if a new Place or Land shall be discovered, in which are People altogether destitute of Reason, such have no Dominion, but out of Charity only is due unto them what is necessary for Life; for such are accounted as Infants or Mad-men, whose Right or Property is transferred, that is, the use of the same, according to the Law of Nations; in such Cases a charitable War may be commenc'd.

*Procopius Per-
fic. 2.*

XVIII. To prevent all the sad Calamities that must inevitably follow the ungoverned Hand in War, Faith must by all Means be laboured for; for by that, not only every Common Wealth is conserved, but also that greater Society even of Nations, that once being taken away, then farewell Commerce, for that must be then taken away from Man; for Faith is the most Sacred thing that is seated in the Breast of Man, and is so much more religiously to be kept by the supreme Rulers of the World, by how much more they are exempted from the Punishment of their Sins here than other Men: Take away Faith, and then Man to Man would be (as *Mr. Hobbs* observes) even Wolves; and the more are Kings to embrace it, first for Conscience, and then for Faith and Credit sake, upon which depends the Authority of their Government. The Ambassadors of *Justinian* addressed their Speech to *Chosroes* after this manner: *Did we not see you here with our own Eyes, and pronounce those Words in your Ears, we should never have believed that Chosroes the Son of Cabades,*

abades, would bring his Army, and enter forcibly into the Roman Bounds, contrary to his League, the only Hope left to those that are afflicted with War? For what is this, but to change the Life of Men into the Life of wild Beasts? Take away Leagues, and there will be eternal Wars, and Wars without end will have this Effect, to put Men besides themselves, and divest them of their Nature. If then a safe Peace may be had, it is well worth the releasing of all or many Injuries, Losses, and Charges, according to that in Aristotle: Better it is to yield some of our Goods to those that are more Potent, than contend with them and lose all; for the common Chances of War must be considered, which if so, the Scope of the principal part of this First Book may be avoided, and we get into the peaceable Tract of Traffick and Commerce.

The End of the First Book.

BOOK.

BOOK II.

CHAP. I.

Of the various Rights and Obligations of Owners and Partners of Ships in Cases private.

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| <p>I. <i>Of Navigation in general.</i></p> <p>II. <i>Of Owners their several Powers over those Vessels they are Partners in. Trover for a part of a Ship.</i></p> <p>III. <i>Where Ships are oblig'd to make a Voyage before they can be sold; and what may be done when part protest against a Voyage.</i></p> <p>IV. <i>The Master how brought in by the Owners, and the reason why in such a manner.</i></p> <p>V. <i>Where the Owners ought to be repaired for the Damages of the Master.</i></p> <p>VI. <i>Where Ships broke in pieces determine the Partnership as to the Vessel, and where not.</i></p> <p>VII. <i>Where a Ship shall be the Builders, and where only his, whose Materials she was erected with.</i></p> <p>VIII. <i>Where Property of the Vessel altered changes not that of the</i></p> | <p><i>Boat.</i></p> <p>IX. <i>A Ship for the act of Piracy becomes forfeited; yet if bona fide sold, where the Property may be questioned.</i></p> <p>X. <i>Monies borrowed by the Master, where the same obliges the Owners, and where not.</i></p> <p>XI. <i>Where he that obtains an unlawful possession of a Ship, shall answer the full Freight to the Owners.</i></p> <p>XII. <i>And where the Owners shall have their Freight, though they lose their Lading.</i></p> <p>XIII. <i>Where a Ship may become a Deodand, and where not. Not forfeited till Condemnation.</i></p> <p>XIV. <i>How recoverable by the Laws of England.</i></p> <p>XV. <i>Foreign Ship naturaliz'd upon sale needs not to make Oath again upon the New Act.</i></p> |
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I. IN the precedent Book having observed something of the Rights of Persons and of Things in a state of Nature, and how necessarily they came at first to be appropriated and how equitably they are now continued in the possession of those to whom they are assigned by the donation of others, by the *Laws of Nations*, and maintained or destroyed by the equity of those various Laws which

which rules and governs them in reference to matters publick, all which is justified by the Scripture it self: It may not now seem improper to examine the *private causes* changing the same, and of the contingencies and advantages that wait on that which we properly call Commerce.

The Great Creator having finished his Mighty Work, and given Man that Dominion which he now enjoys, as well over the Fish in the Seas, as the Beasts in the Field, he was not forgetful of bestowing on him those things which were necessary for the Government and support of the same, creating at the same time Trees which grow as it were spontaneously into Vessels and Canoos; which wanted nothing but launching forth to render them useful for his accommodation, which afterwards he by his Divine Genius (inspired by that Mighty One) finding Materials, hath since so compleated and equipt, as to render it the most beautiful and stupendious Creature (not improperly so called) that the whole World can produce, which being not retarded by lett of Winds, or other contingent accidents, submits it self to plow the unknown paths of that vast Element, to brave all Encounters of Waves and Rocks, to fathom and survey the vast immensities of the very World it self, to people, cultivate, and civilize uninhabited and Barbarous Regions, and to proclaim to the Universe the Wonders of the *Architect*, the skill of the *Pilot*, and above all the Benefits of *Commerce*; so that it is no wonder at this day to find Nations contending who should surpass each other in the Art of Navigation, and to monopolize if possible, the very Commerce and Trade of the World into their hands; and that, all by the means of this most excellent Fabrick.

II. Hence it is, that Ships and Vessels of that kind being originally invented for use and profit, not for pleasure and delight, to plow the Seas, not to lie by the Walls, to supply those of the Mountains as well as those on the Sea Coasts.

*Aretin. post Jor-
an. Faber. in S.
item exercitor.
num. 3. Inst. de
oblig. qua ex
quasi delict.*

Therefore upon any probable design the major part of the Owners may even *against the consent*, though not without the *privity* and knowledge of the rest, freight out their Vessel to Sea.

If

If it should so fall out that the major part *protest* against the Voyage, and but one left that is for the Voyage, yet the same may be effected by that party, especially if there be *equality* in Partnership.

As an encouragement to the Building of Ships being of that universal Advantage to the Publick in point of Trade, and Commerce, to contrive and vest the Owners propriety in them, both by the Common Laws of this Realme, and the Maritime Laws, it is provided that in case a Ship be taken away or the Owners dispossess, they may maintain an Action of Trover and Conversion for an 8th, a 16th, or any other Part or Share of the same.

Tenants in
Common of a
Ship.

Litt. §. 323.

1 Inst. 199. b.

200. a.

Salk. 290, 392.

In an Action on the Case, the Plaintiff declared that he was Owner of the 16th part of a Ship, and the Defendant Owner of another 16th Part of the same Ship, and that the Defendant fraudulently and deceitfully carried the said Ship *ad loca transmarina*, and disposed of her to his own use, by which the Plaintiff lost his 16th part to his damage, on not guilty pleaded, and verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Action did not lye, for tho' it be found deceptive, yet this did not help it, if the Action did not lye on the subject matter. And here they are Tenants in Common of the Ship, and by *Littleton* between Tenants in Common there is not any Remedy, and there cannot be any fraud between them, because the Law supposes a trust and confidence betwixt them; and upon these Reasons Judgment was given *quod Querens nil capiat per billam*. *Graves* against *Sawcer*, *Raym.* 15. *1 Levinz.* 29. and *1 Keeble* 38. 3 *Leon.* 228. *Bennington* against *Bennington*.

Leg. Fin. C. §.
pro Socio &
pos. inst. &
D. eod.

Leg. in hoc pa-
rag. si conveni-
at pro Soco.

III. Owners by Law can no ways be obliged to continue their paction or partnership without sundering; but yet if they will sunder, the *Law Marine* requires some considerations to be performed before they can so do. And therefore if the Ship be newly built, and never yet made a Voyage, or is newly bought, she ought to be subject to one Voyage upon the common out-read and hazard, before any of the Owners shall be heard to sunder and discharge their parts; but by the Laws of *England* the Owners may before any such Voyage, sell or transmit their Right.

If it falls out that one is so obstinate that his consent cannot be had, yet the Law will enforce him either to hold, or to sell his proportion; but if he will set no price, the rest may out-rigg her at their own costs and charges, and whatsoever Freight she earns, he is not to have any share or benefit in the same. But if such Vessel happens to miscarry or be cast away, the rest must answer him his part or proportion in the Vessel.

Bart. & Paul. in Leg. hoc distinctio S. cum fundum ff. locat.

Such Vessels when freight-
ed out against
the grain of

Some of the Part-Owners, the same is under such Provisoos, Cautions and Limitations as the Law in that case requires.

But if it should fall out that the major part of the Owners refuse to set out the Vessel to Sea, there by reason of the unequality they may not be compelled; but then such Vessel is to be valued and sold: The like where part of the Owners become deficient or unable to set her forth to sea.

Gloss Leg. finavis & juris in Leg. utq; paraculpa derei undic. & Leg. arboribus. S. navis de usufruct.

IV. The Master of the Vessel is eligible by the Part-Owners in proportion, not by the majority, and he that is most able is to be preferred. The Wisdom of the latter Ages have been such; that few have gone out in that condition, but those that have commonly had shares or parts in the same Vessel. In the preferring therefore of a Master, his ability and honesty is to be considered, since on him rests the charge not only of the Vessel, but of the Lading; their very actions subjecting the Owners to answer for all damage that shall be sustained by him or his Mariners, be it in the Port or at Sea, to the Lading or Goods of the Merchant or Laders, and they are made liable as well by the Common Laws * of England, as the Law † of the Marine.

Leg. non aliter F. de usu & habei.

† *Coke 4 Instit. 146.*

18 H. 8. n. 58.

* *Hill. 23 Car.*

2. B. R. Morfe

versus Slue.

† *Nautæ Gaup.*

Stat. Leg. 1.

Señ. 3.

V. If the Master commits offences either negligently or wilfully, he shall be responsible over to his Owners for the reparation of damage; nor are they bound to joyn, but may sever and sue apart as well by the Common Law * as the Marine: So likewise if the Ship hath earned Freight, and part of them receive their parts, the rest may bring their Action for their share without joyning with the others.

* *Hill. 26, 27.*

Car. 2. in B. R.

Stanley versus

Ayles. 3. Keeble

444.

Master and
Owners re-
sponsible.

Of Owners and Partners of Ships. Book 1

The Defendant and seven other Persons were proprietors of a Ship, in which Goods were usually transported for hire, and the Plaintiff *onerat* Goods upon the Ship to be carried for hire, from *London* to *Topsham* in *Comitia Devon*, and that the Defendant received them, and undertook to bring them to *Topsham*, but that he not being careful of his Duty but neglecting it; *tam improvidenter* placed and carried the said Goods, that tho' the Ship safely arrived at *Topsham*, yet the Goods were spoiled. And upon *non culp.* pleaded. The Jury found a special Verdict, *viz.* That the Defendant and seven other Persons were Proprietors and Part-Owners of the Ship, that the Ship had a Master *locat* in her by the Part-Owners who had 60 *l.* Wages for every Voyage between *Topsham* and *London*, that the Goods were delivered to the Master none of the Part-Owners being present, and that there was not any Contract made with them or any of them by the Plaintiff, that the Ship arrived safe to *Topsham* but the Goods were spoiled. *Et si pro Quer. pro Quer si non pro Def.*

And two points were made.

1. If the Proprietors are chargeable no Contract being made with them, and there being a Master that is chargeable in respect of his Wages, according to the Case of *Mors* and *Slue*, yet *per Holt Ch. Justice* clearly, that tho' the Master be chargeable in respect of his Wages, so are the Proprietors in respect of their Freight that they receive for the carriage of the Goods at the Election of the Plaintiff.

2. If the Action lay against the Defendant alone, it appearing that there are other Part-Owners not made Defendants, and held that the Action did not lye against him sole, but ought to have been against all the Part-Owners, for all the Part-Owners are chargeable in respect of the Profit they make by the carriage of the Goods, and that in point of Contract upon their undertaking, be it implied or express, and are not chargeable as Trespassers, for then one might be chargeable alone but in point of Contract upon their Receipt of the Goods to be carried for hire. Judgment *pro Defen.* as by 3 *Mod.* 321. *Boson con. Sanford* 3 *Levinz.* 258. where

is with a *Cur. advisare, mes le Reporter ut auditur Judg-
ent pro Defen.*

VI. If a Ship be broken up or taken in pieces, with an intent to convert the same to other uses; if afterwards upon advice or change of mind, she be rebuilt with the same Materials, yet this is now another, and not the same ship, especially if the Keel be ript up or changed, and the whole Ship be once all taken asunder and rebuilt, here determines the Partnership *quoad* the Ship. But if the Ship be ript up in parts, and taken asunder in parts, and repaired in parts, yet she remains still the same Vessel and not another; nay though she hath been so often repaired that there remains not one stick of the Original Fack.

Leg. inter stipulantem in S. Sacram ff. de ver. oblig.

Leg. quod in S. fin. F. de Leg.

VII. If a Man shall repair his Ship with Plank or other Materials belonging to another, yet the Ship maintains and keeps her first Owners.

Leg. Manus ff. de rei vendic.

But if a Man take Plank and Materials belonging to another, and prepared for the use of Shipping, and with them build a Ship, the property of the Vessel follows the owners of the Materials and not the Builder.

ff. lib. 6. tit. 1. leg. 61.

But if a Man cut down the Trees of another, or takes Timber or Planks prepared for the erecting or repairing a dwelling-House; nay, though some of them are for Shipping, and builds a Ship, the Property follows not the owners but the Builders.

Leg. si ex meis, ff. de acq. rer. dom. & Leg. si convenerit S. si quis sic. ff. de pign. act.

VIII. If a Ship be sold together with her Tackle, Furniture, Apparel, and all other her Instruments thereunto belonging, yet by these words the Ships Boat is not conveyed, but that remains still in the Owners; so it is if the ship be freighted out, and afterwards at Sea she commits piracy: The Ship is forfeited, but the Boat remains still the Owners †.

Leg. Marcellus in S. armamenta. ff. de rei vindic.

† Trin. 3. Jac. B. R. Rolls 1. num. 6.

Abridg. fol. 530. Bald. in Leg. cum proponas Cod. de. Nautic. è favore,

And though Ballast is generally used in Shipping by those Ships that are freighted outwards, in order to bring home of Goods, yet is not the same any part of the furniture of the Vessel; and so it was adjudged in debt on the Condition was, that whereas the Plaintiff had bought of the Defendant a Ship, if the Plaintiff shall enjoy the

the

the said Ship with all the Furniture belonging to the same, without being disturbed for the Ship or any Furniture appertaining to it, that then, &c. and the case fell out to be, that after the sale of the Ship, a stranger sued the Plaintiff for certain monies due for Ballast bought by the Defendant for the same Ship, in which Suit he obtained Sentence, upon which the Ship was seized, the Question was, If Ballast be Furniture for a Ship or not, it was resolved that it was not; for though it may be as necessary as Sails, yet it is not always so, for sometimes they sail without Ballast, for the Merchandize it self may be sufficient to answer that purpose.

*Mich. 29 Eliz.
in C. B.
Linter's Case,
Leon. 46, 47.*

IX. If a Ship commits a Piracy, by reason of which she becomes forfeited, if before seizure she be *Bona fide* sold, the property shall not be questioned, nor the Owners divested of the same.

*Mich. 13 Jac.
in B. R. Sir
Rich. Bingley's
Case, Rolls
Abridg. fol.
530.
Dig. lib. 14.
tit. 1. §. 17.*

X. If a Master shall take up Monies to mend or victual his Ship where there is no occasion, (though generally the Owners shall answer the fact of the Master) yet here they shall not, but only the Master. But if there were cause of mending the Ship, though the Master spend the Money another way, yet the Owner and Ship become liable to the satisfaction of the Creditor; for it were very unreasonable that the Creditor should be bound to take upon him the care of repairing the Ship, and supply the Owners room, which must be so, if it should be necessary for him, to prove that the Money was laid out upon the Ship; so on the other hand, it stands with reason that he be sure that he lends his Money on such an occasion as whereby the Masters fact may oblige the Owners, which he cannot do otherwise, unless he knows that the money borrowed was necessary for the repair of the Ship; and therefore if the Ship wanted some repairs, and a far greater and more extravagant sum was lent than was needful, the Owners shall not be liable for the whole.

*Bridgman's
Case, Hobart,
fol. 11. 12.
Moo. 918.*

*Gloss. Africain.
Super eod. leg.
& S.*

*Dig. lib. 6. tit.
1. 62. & lib. 7.
tit. 1. 12. §. 1.
& Papinon on
the same Law.*

XI. If a man gets possession of Ship having no Title to the same, by the Law Marine, he shall answer such damage as the Ship in all probability might have earned; and the reason of that is, because the only end of Shipping, is the employment thereof: but if a Warrant be directed out of the Admiralty to the Marshal of the same Ship, to arrest such a Ship and *Salvo Custodire*, who by force of the same enters

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enters into the same Ship, though the Warrant does not mention that the Officer should carry away the Sails of the same Ship, yet he may justifie the taking the same, for that he cannot *Salvo Custodire* the same Ship, unless he carries away the Sails. Mich. 2 Car. in B. R. Creamer versus Tockley, Litch. fol. 188.

XII. A Ship is freighted out, accordingly she receives in her Lading pursuant to agreement, afterwards an Embargo happens, and the Lading is taken as forfeited, yet the Owners shall notwithstanding receive Freight, for there is no fault in them, but only in the Merchant. Digest. lib. 19. tit. 2. 61. Scavola on the same Law.

XIII. In *Aqua dulci* a Ship may become a Deodand, but in the Sea, or in *Aqua salsa*, being an Arm of the Sea, no Deodand of the Ship or any part of it, though any body be drowned out of it, or otherwise come by their death in the Ship, because on such waters, Ships and other Vessels are subject to such dangers upon the raging waves in respect of Wind and Tempest; and this diversity all our ancient Lawyers do agree in, and it does more especially appear in the Parliament Rolls, whereupon a Petition it was desired, *That if it should happen that any Man or Boy should be drowned by a fall out of any Ship, Boat, or Vessel, they should be no Deodands*: Whereupon the King by great advice with his Judges and Council learned in the Laws, made answer, *The Ship, Boat or Vessel, being upon the Sea should be adjudged no Deodand, but being upon a fresh River it should be a Deodand* — but the King will shew favour. Rot. Parliam. 51 Ed. 3. num. 73. 1 R. 2. n. 106. 4 R. 2. n. 33. 1 H. 5. n. 35. There are abundance of other Petitions upon the like occasion in Parliament.

A Ship lying at *Redrith*, in the County of *Kent*, near the shore to be careen'd and made clean, it happened that one of the Shipwrights being at work under her at low Water, the Vessel (then leaning aside) fortun'd to turn over the contrary side, by means of which the Shipwright was killed: Upon a Tryal at Bar, where the Question was, Whether this Deodand did belong to the Earl of *Salisbury*, who was Lord of the Mannor, lying contiguous to the place where the Man was slain, or to the Almoner as a matter not granted out of the Crown? In that case it was resolved, That the Ship was a Deodand, and the Jury thereupon found a Verdict for the Lord of *Salisbury*, that the same did belong to his Mannor. Mich. 29 Car. 2. in B. R.

Vide 1 Ven. 47.

1 Sid. 421.

1 Mod. 18.

On Importation of prohibited Goods, the Ship cannot be seiz'd as forfeit till a Condemnation in the Exchequer thereon. *Horne against Ivey* 2 *Keeble* 604.

XIV. Thus Men from their necessity and safety having from hollow Trees, nay Reeds, Twigs and Leather (for such were the rude beginnings of those stupendious things we now admire) advanced the Art to that degree, as to render it now the most useful thing extant; and as the Mathematicks, Astronomy and other Sciences have added to its security, so have succeeding Ages from time to time, provided priviledges and Laws by which it hath always been regulated and governed, the which upon all occasions, and in all Courts have generally had a genuine construction as near as might be to the Marine-Customs; and therefore at this day, if a Ship be taken away, or the Owners dispossess'd, they may maintain an Action of Trover and Conversion for an eighth or sixteenth part of the same, as well by the Common Laws of this Kingdom, as the Law Marine, and they need not joyn with the rest of their Owners.

Ship Naturalized.

Upon an information *tam quam*, grounded upon the Act of Navigation, for importing Goods in a Foreign Ship contrary to that Act. The question was, whether or not, if a Foreign Ship naturalized by the new Act, being a Prize taken in the late War with *Holland*, be afterwards sold to a Foreigner, who sells her again to an *English* Man, whether or no the Oath must be taken again according to the new Act? *Per Curiam* it need not, because that the Ship was once lawfully naturalized. *Hardres* 511. *Marine* against *Verdue*.

Forfeitures for delivering Goods without paying the Duties.

§. 15.

XV. Stat. 4th and 5th *Will.* and *Ma. cap.* 15. §. 14. All persons who by way of Insurance, or otherwise, shall undertake to deliver any Goods imported from beyond Sea without paying the Duties payable for the same, or any prohibited Goods, shall forfeit 500 l.

And all who shall agree to pay any Money, for the insuring or conveying any Goods imported without paying the Duties, or any prohibited Goods, or shall receive such prohibited Goods, or such other Goods before the Duties are paid, knowing thereof; shall also forfeit for every Offence 500 l.

And

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And if the Insurer or Manager of such Fraud be discovered, he shall not only keep the Insurance Money given him, and be discharged of the Penalties to which he is liable; but shall have one half of the Penalties imposed upon the Parties making such Insurance or receiving the Goods as aforesaid: And in case no discovery be made by the Insurer, and the Party Insured shall make discovery thereof, he shall recover back his *Premium*, and have one Moiety of the Forfeitures imposed upon the Insurer, and be discharged of those imposed upon himself.

§. 16.

The said Penalties and Forfeitures to be recoverable according to the Course of the Exchequer.

§. 17.

No Penalty to be recoverable, unless prosecuted with-
in 12 Months after the Fact committed.

§. 18.

P 2

CHAP.

C H A P. II.

Masters of Ships their Action considered in reference to cases private and publick.

- I. *A Master or Skipper his condition considered, in reference to his Interest and Authority generally. The Master only liable to deviation and Barratry.*
- II. *If Goods be lost or imbezled, or any other detriment happens in a Port, who shall answer. Master chargeable to pay the Duty of weighage.*
- III. *The Duty of Masters of Ships, as if they shall set Sail after an Embargo, who shall answer?*
- IV. *Of Faults ascribed to him before departure in Tempestuous weather, staying in Port, &c.*
- V. *Over-charging or over-lading the Ship above the Birth-mark, or receipt of such Persons on Ship-board as may hazard the Lading.*
- VI. *Of Lading aboard in the Ships of Enemies, his own proving disabled.*
- VII. *Of shipping Goods elsewhere than at the publick Ports or Keys, and the taking in prohibited Goods.*
- VIII. *Of wearing unlawful Colours or Flags, and of yielding up his Ship cowardly, if assaulted, where liable, and where excused.*
- IX. *Of carrying fictitious Cocquets and Papers, and refusing payment of Customs and Duties.*
- X. *Of setting Sail with insufficient Tackle, and of taking in and delivering out with the like; and of his Charge of Goods till safely delivered.*
- XI. *Of departing without giving notice to the Customer.*
- XII. *Of Faults committed by Master and Skippers at Sea:*
- XIII. *Rules in Law in the charging him for reparation of damage, in case Master of a Ship suable in the Admiralty, for wasting or spoiling Goods.*
- XIV. *Of the Power and Authority that the Master hath in disposing Hypothecating or Pledging the Ship, Furniture and Lading.*
- XV. *Where Masters are disabled, though in necessity, to impawn the Vessel.*
- XVI. *Where they may dispose of Vessel and Lading, and where not.*
- XVII. *What Vessels and Mariners the Master must have for importing in or exporting out of his Majesty's Plantations in Asia, Africa, and America.*
- XVIII. *What Ships may go from Port to Port in England.*
- XIX. *Ships not to import the Goods of any Country, but of that from whence they are brought.*
- XX. *What time the Master shall be coming up after arrived at Gravesend, or at any other Port within the Realm, in order to his discharge.*
- XXI. *Of going from Port to Port within the Realm how provided.*
- XXII. *Of Goods prohibited to be imported from the Netherlands or Germany in any Ships whatsoever.*

I A Master of a Ship is no more than one, who for his knowledge in *Navigation*, fidelity and discretion, hath the Government of the Ship committed to his care and management; and by the *Common Law*, (by which Properties are to be guided,) he hath no Property either general or special, by the constituting of him a Master; yet the Law looks upon him as an *Officer*, who must render and give an account for the whole charge, when once committed to his care and custody; and upon failure to render satisfaction. And therefore if misfortunes happen, if they be either through negligence, wilfulness, or ignorance of himself or his *Mariners*, he must be responsible.

Leg. 1. de Execut. cit. Aff.

Hob. Rep. fol. 11. Bridgman's Case.

A Master of a Ship so appointed by B. Owner, treats with the Plaintiff to take the Ship to Freight for 80 Tuns to Sail from *London* to *Falmouth*, and so from thence to *Barcelona*, without altering the Voyage; and there to unlade at a certain Rate per Tun. And to perform this the Master obliges the Ship and what was therein, valued at 300 *l.* and accordingly a Charter-party was made and sealed between the Master and the Merchant, but the Owners of the Ship were no Parties thereunto. The Master deviates and commits Barratry, and the Merchant, in effect loses his Voyage and Goods, for the Merchandize being Fish, came not till *Lent* was past, and were rotten. The Merchant's Factor thereupon sueth the Master in the Court of Admiralty at *Barcelona*, and upon an Appeal to an higher Court in *Spain*, hath Sentence against the Master and the Ship; which coming to his Hands (*viz.*) the Merchants Hands, the Owner brings an Action of Trover for the Ship; the Master sues in Chancery to stop this Suit, and another Suit brought for the Owner for Freight, claiming deductions out of both, for his Damages sustained by the Master, for the breach of the Articles by the Master, for if the Owner gives Authority to the Master to contract he shall bear the loss, but in Case of Bottomry after a Voyage begun the Master cannot oblige the Owner beyond the Value of the Ship; But this Case is on Contract.

In Chancery.

Lord Chancellor, The Charter-Party values the Ship at a certain rate, and you shall not oblige the Owners farther, and that only with relation to the Freight, not to the value of the Ship; the Master is liable to the deviation and Barratry, but not the Owners; else Masters should be Owners of all mens Ships and Estates, Mich. 29. Cap. 2.

Vide 5 Co. 107.
Mo. 891, 916.

II. If the fault be committed in any Port, Haven, River or Creek, or any other place which is *infra Corpus Comitatus*, the Common Law shall have Jurisdiction to answer the party damnified, and not the Admiralty; but if the same be committed *super altum mare*, the Admiralty shall have Jurisdiction of the same; yet if it be on a place where there is *divisum imperium*, then according to the Flux or Reflux the Admiralty may challenge the other of Common right belonging to the Common Law.

F. Naut. caup.
stab. leg. 1.
Sect. 2, 3, 6, 7.

And therefore so soon as Merchandizes and other commodities are put aboard the Ship, whether she be riding in Port, Haven, or any other part of the Seas, he that is *Exercitor Navis* is chargeable therewith; and if the same be there lost or purloyned, or sustain any damage; hurt or loss, whether in the Haven or Port before, or upon the Seas after she is in her Voyage, whether it be by Mariners or by any other through their permission, he that is *Exercitor Navis* must answer the damage, for that the very lading of the Goods aboard the Ship, does subject the Master to answer the same; and with this agrees the Common Law, where it was adjudged, That Goods being sent aboard a Ship, and the Master having signed his Bills of Lading for the same, the Goods were stowed, and in the night divers Persons, under the pretence that they were Press-masters, entered the Ship and robb'd her of those Goods; the Merchant brought an Action at the Common Law against the Master; and the Question was, Whether he should answer for the same; For it was alledged on his part, That there was no default or negligence in him, for he had a sufficient guard, the Goods were all lock'd up under Hatches, the Thieves came as *Press-Masters*, and by force robb'd the Ship; and that the same was *vis major* †, and that he could not have prevented the same. And lastly, That though he was called Master or *Exercitor Navis*, yet he had no share in the Ship, and was but in the Nature of a Servant, acting

1 Mod. 85.
Raym. 220.
1 Ven. 190, 238.
2 Keb. 866.
3 Keb. 72, 112,
132, 135.

† The which
the Civil Law
does some
times allow.

ing for a Salary. But notwithstanding it was adjudged * *Reg. 105.*
 for the Plaintiff, for at his peril he must see that all *F. N. B. 104 b.*
 things be forth-coming that are delivered to him, let *1 Inst. 89.*
 what accident soever happen; (the act of God, or an E- *4 Co. 84. a.*
 nemy, perils and dangers of the Seas only excepted) but *Mo. 876.*
 or Fire, Thieves and the like, he must answer, and is in the *Hob. 17, 18.*
 nature of a * Common Carrier; and that though he re- *Poph. 178, 179.*
 ceives a Salary, yet he is a known and publick Officer, *Cro. Jac. 188,*
 and one that the Law looks upon to answer, and the *189, 330, 331.*
 Plaintiff hath his Election to charge either Master or *Salk. 388.*
 Owners, or both at his pleasure, but can have but one *1 Sid. 36.*
 satisfaction.

*Debet Exercitor omnium
 nautarum, suo-*

*um sive liberi sint sive servi, factum prestare, nec immerito factum eorum prestat, cum
 ipse eos suo periculo adhibuerit: Sed non alias prestat quam si in ipsa nave damnum datum
 sit, ceterum, si extra navim licet à nautis, non prestabit. Naut. Caup. Stabilit, Leg. 1.
 sect. 7. debet Exercitor.*

If a Master shall receive Goods at the Wharf or Key, *Eod. Leg. debet*
 or shall send his Boat for the same, and they happen to *Exercitor.*
 be lost, he shall likewise answer both by the Marine Law
 and the Common Law.

Mayor & Com. de London against Hunt.

Error of a Judgment in B. R. in Assumpsit brought by
 the Mayor and Commonalty against Hunt, where they de-
 clared of a Custom, That they and their Predecessors, May-
 jors, &c. had of every Master of a Ship 8 l. per Tun for
 every Tun of Cheese brought from any place in England
 to the Port of London, ab oriente de London-Bridge, in the
 name of Weighage; and that the Defendant being Ma-
 ster of a Ship, had brought to the Port of London so ma-
 ny Tuns, which at that rate came to so much, which he
 hath not paid, upon *non Assumpsit*, Verdict and Judgment
 for the Plaintiff. Upon which Hunt the Defendant, brought
 a Writ of Error, and two Errors were assigned. 1. That
 the Action did not lye against the Master, but that the
 Duty was due from the Merchants, Owners of the Goods,
 but the Judgment was affirmed, for that the Master is in-
 trusted with the Goods, and hath a Recompence from
 the Merchants for bringing the Goods, and is respon-
 sible for them, and therefore shall be charged for the
 Duty; and it would be infinire to search for the Owners
 of the several Goods, which are all in the Custody of the

Master who brought them into Port, and therefore he shall be charged. 3. *Levinz.* 37.

Pig. lib. 9.
tit. 2. Leg. 61.

III. If Goods be laden aboard, and after an Embargo or Restraint from the Prince or State comes forth, and then he breaks Ground, or endeavours to sail away, if any damage accrues, he must be responsible for the same. The reason is, because his Freight is due and must be paid; nay, although the very Goods be seized as *bona contrabandos*.

* *Leg Oleron.*
Judg. 2.

IV. He must not sail in Tempestuous weather, nor put forth to Sea without having first consulted with his Company*; nor must he stay in Port or Harbour without just cause when a fair wind invites his departure.

V. He must not over-charge or lade his Ship above the Birth-mark, or take into his Ship any Person of an obscure and unknown Condition, without Letters of safe Conduct.

Stat. 18 H. 6.
cap. 8.

Lib. ult. ad Leg.
Rhod. & Leg.
quum proponas
C. de Naut. fæ-
por.

VI. Nor ought he to lade any of his Merchant's Goods aboard any of the King's Enemies Ships (admitting his own Vessel leaky or disabled) without Letters of safe Conduct; otherwise the same may be made Prize, and he must answer the Damage that follows the Action.

Stat. 4 H. 4.
20.

Nor shall he come or sneak into the Creeks or other places, when laden homewards, but into the King's great Ports, (unless he be driven in by Tempest) for otherwise he forfeits to the King all the Merchandize, and therefore must answer.

Stat. 15 H. 6.
cap. 8.

1 El. c. 11. §. 2.

13, 14 C. 2.

c. 11. §. 14.

19 Eliz. cap. 9.

1, 2 P. & M. 5.

1 Jac. cap. 25.

12 Car. 2. cap.

18.

** Proclamati-*

on Sept. 25.

Anno 26 Car. 2.

Per Leg. quum

proponas ad

Leg Rhod.

D Leg in fin. &

Leg. si vendit

peric. rei vend.

& Leg. c. 6.

Naut. Camp.

VII. Nor ought he to ship any Merchandizes, but only at the Publick Ports and Keys.

He must not lade any prohibited or unlawful Goods, whereby the whole Cargo may be in danger of Confiscation, or at least subject to seizure or surreption.

He may not set sail without able and sufficient Mariners both for quality and number.

VIII. He may not use any unlawful Colours, Ensigns, Pendants, Jacks or Flags*, whereby his Ship or Lading may incur a Seizure, or the Cargo receive any detriment or damage.

He must not suffer the Lading to be stolen or imbezled; if the same be, he must be responsible, unless it be where there is *vis major*; as if he be assaulted at Sea either by Enemies,

es, Ships of Reprize, or Pirates; there, if no Fault or negligence was in him, but that he performed the part of an honest, faithful, and valiant man, he shall be excused. Yet it hath been adjudged, That if a Merchant-ship lies in a Port or Haven, and a Pirate, Sea-Rover, or other Thieves enter her and over-power her Men, and rob her, yet the Master must be responsible; but if an Enemy enter and commit the depredation, there the Master is excused. 2 Keeble 866, 3 Keb. 72, 112, 132, 135.

IX. He must not carry any counterfeit Cocquets or other fictitious and colourable Ship-Papers to involve the Goods of the Innocent with the Nocent.

Nor must he refuse the payment of the just and ordinary Duties and Port-charges, Customs and Imports, to the Hazard of any part of his Lading; yet if he offers that which is just and pertains to pay, then he is excused.

X. He must not set sail with insufficient Rigging or tackle, or with other or fewer Cables than is usual and requisite, respect being had to the burden of the Vessel; and if any damage happens by the delivery of the Goods to the Lighter, as that the Ropes break, and the like; where he must answer; but if the Lighter comes to the Wharf or Key; and then in taking up the Goods, the Rope breaks, the Master is excused, and the Wharfinger liable.

If fine Goods, or the like, are put into a close Lighter, and to be conveyed from the Ship to the Key, it is usual here, that the Master send a competent number of his Mariners to look to the Merchandize, if then any of the Goods are lost and imbezelled, the Master is responsible, and not the Wharfinger; but if such Goods are to be sent aboard a Ship, there the Wharfinger, at his Peril, must take care the same be preserved.

XI. After his arrival at Port, he ought to see that the Ship be well moored and anchored, and after reladed, not to depart or set sail till he hath been cleared; for if any damage happens by reason of any fault or negligence in him or his Mariners, whereby the Merchant or the Lading receives any damage, he must answer the same.

XII. And as the Law ascribes these things and many more to him as faults, when committed by him or his

Mari-

1. Ven. 190,

238.

Raymond 220.

1. Mod. 85. 2.

Lewins. 69.

13 R. 2. cap. 9.

Leg. 1. Cod. de

Navib. non ex-

cusand.

Secund. fin. Leg.

ult. ad Leg.

quum proponat

C. de Naut. for-

nor Leg. Oleron.

24. Per. Leg.

quant. de 1. 2.

* Pasch. 26

Car. rul'd at

Guild Hall by

L. C. J. Hale.

18 Eliz. cap. 9.

14 Car. 2.

cap. 11.

Mariners in Ports, so there are other things which the Law looks upon to be as faults in him in his Voyage, when done.

*Digest. l. cum
in debito F. de
Probat.*

As if he deviates in his course without just cause, or steers a dangerous and unusual way, when he may have a more secure passage; though to avoid illegal impositions, he may somewhat change his course; nor may he sail by places infested with Pirates, Enemies, or other places notoriously known to be unsafe, nor engage his Vessel among Rocks or remarkable Sands, being thereto not necessitated by violence of Wind and Weather, or deluded by false Lights.

*Lib. 1. Cod. de
Navibus non
excusand.*

The Master shall not be answerable for the Contracts of their Mariners, but they may be detained for their Crimes.

XIII. By the Marine Law, he that will charge a Master with a Fault, as in relation to his Duty, must not think that a general charge is sufficient in Law, but he ought to assign and specify the very fault wherewith he is so charged.

So that he will not infer, that such or such a sad disaster hath happened or been occasioned by reason of some fault in the Mariners; must not only prove the fault itself, but must also prove that that fault did dispose to such a sad event; or that such a misfortune could not have happened without such a fault precedent.

*Infant Master
of a Ship, liable
to be sued in the
Admiralty.*

If an Infant being Master of a Ship, by Contract with another, take upon him to bring certain Goods from *Smiths* to *England*; and there to deliver them, but delivers them not according to agreement, but wastes and consumes them, he may be sued in the Admiralty Court, altho' he be an Infant, for this Suit is but in Nature of a Detinue or a Trover and Conversion at the Common Law, and a Prohibition denied for that Cause. *Furness against Smith. 1 Rolls Abr. 530.*

*†Receipt. sal-
vum fore, utrum
si in navim res
missæ ei assign-
natæ sint, an
et si non sint ei*

XIV. When Voyages are undertaken, the Master is there placed in by the Owners, and they ought to make good the Masters fact and deed; † and therefore as the whole care and charge of Ship and Goods are committed to the Master, it is the prudence of the Owners to be careful who they will admit Commander of their Ship, since their actions subject them to answer the damage, or

what

Whatever other Act he shall do in reference to his Employ; therefore he can freight out the Vessel, take in Goods and Passengers, mend and furnish the Ship, and to that effect, if need be, in a strange Country he may borrow money, with advice of his Mariners, upon some of the tackle, or sell some of the Merchandize. If part of the Goods shall be sold in such necessity, the highest price that the remainder are sold for, must be answered and paid to the Merchant; after which the Merchant may pay for the Freight of those Goods as well as for the remainder, *Oleron. 1.* But if the Ship in the Voyage happens to be cast away, then only shall be tendered the price that the Goods were bought for.

assignatæ, hoc tamen ipso quod in navim missæ sint, receptæ videntur, & omnium receiptarum custodiam quæ in navim illatæ sunt, & factum non solum nautarum prestare debet, sed & rectorum. F. Nautæ Caup. Stab. Leg. 1. Sect. receiptæ.

By the *Common Law*, the Master of a Ship could not implead the Ship or Goods, for any Property either general or special was not in him, nor is such power given unto him by the constituting of him a Master.

Yet the *Common Law* hath held the Law of *Oleron* reasonable, That if a Ship be at Sea and takes leak, or otherwise want Victuals or other Necessaries, whereby either the Ship or self be in danger, or the Voyage may be defeated, that in such case of necessity the Master may impawn for money or other things, to relieve such extremities, by employing the same to that end; and therefore he being the Person trusted with the Ship and Voyage, may therefore reasonably be thought to have that power given to him implicitly, rather than to see the whole lost.

Leg. Oleron. c. 22. Hob. 11, 12. Latch 252. Noy. 95. Mo. 918. Leg Oleron c. 1, 12. Salk. 34. pl. 7.

A Ship put into *Boston* in *New-England*, and there the Master took up Necessaries, and gave a Bill of Sale by way of Hypothecation, and there being a Suit against the Ship and Owners to compel Repayment, a Prohibition was prayed; whereupon the Court held, that the Master could not by his Contract make the Owners personally liable to a Suit, and therefore granted a Prohibition as to them, but refused it as to the Ship; for the Master can give no Credit but upon giving security by Hypothecation: and that it was unreasonable for them to prevent the Court of Admiralty's giving a Remedy, when they could give none themselves.

Lex Mercator 102. 122.

But a Master for any debt of his own, cannot Impawn or Hypothecate the Ship, &c. for the same is no ways liable but in case of necessity for the relief and completion of the Voyage.

Nor

Salk. 35. pl. 9. 2 Mod. Cap. 79.

*3 Siderf. 453.
Vid. 1 Rolls.
Abr. 530. pl. 2.*

Nor can he sell or dispose of the same without an Authority or Licence from the Owners; and when he does Impawn or Hypothecate the Vessel or Furniture, he ought to have the consent and advice of his Mariners.

XV. And where the Ship is well engaged, she is forever obliged, and the Owners are concluded thereby till Redemption.

But in regard Masters might not be tempted to engage the Owners, or infetter them with such sort of obligations, but where there is very apparent cause and necessity, they seldom suffer any to go Skipper or Master, but he that hath a share or part in her; so that if Monies or Provisions be taken up he must bear his equal share and proportion with the rest.

Judgment Oleron. cap. 22.

Nor can the Master on every case of necessity impawn the Vessel or Furniture; for if she be Freightied, and he and the Owners are to join in the laying in of the Provisions for the Voyage, and perhaps he wants money, (a great sign of necessity) yet can he not impawn the Vessel or Furniture, any other or further than for his own part or share in her, the which he may transfer and grant as a man may do an eighth or fifth part in Lands or Houses: But such obligation of the Vessel must be in Foreign parts or places where the calamity or necessity is universal on the Vessel, that will oblige all the Owners.

Judgment Oleron. cap. 3.

XVI. If the Vessel happens afterwards to be wreckt or cast away, and the Mariners by their great pains and care recover some of the ruins and lading, the Master in that case may pledge the same, the product of which he may distribute amongst his distressed Mariners, in order to the carrying them home to their own Country: But if the Mariners no way contributed to the Salvage, then their reward is sunk and lost with the Vessel. And if there be any considerable part of the Lading preserved, he ought not to dismiss the Mariners, till advice from the Ladens or Freighters; for otherwise perchance he may be made liable.

Leg. Oleron. cap. 22.

If Merchants Freight a Vessel at their own charges, and set her to Sea, and she happens afterwards to be Weather-bound, the Master may impawn either the Ship or Lading at his pleasure, or at least such as he could conveniently raise monies on, rather than see the whole Voy-

chap. 2.

lost. And if he cannot pawn the Lading, he may
the same, that is, so much as is necessary; in all
which cases his act obliges.

However, Orders and Instructions are as carefully to
look'd upon and followed as the Magnet.

XVII. He is not to Import into, or Export out of any
English Plantations in *Asia, Africa, or America*, but in
English or Irish Vessels, or of the Vessels built and belong-
ing to that Country, Island, Plantation, or Territory; the
Master and 3 fourths of the Mariners to be *English*, upon
forfeiture of Ship and Goods; and if otherwise, they are
to be look'd upon as Prize, and may be seiz'd by any of
the Kings Officers and Commanders, and to be divided as
Prizes, according to the Orders and Rules of the Sea.

All Goods of the Growth of his Majesties Plantations
are not to be imported into *England, Ireland, or Wales*,
and of *Fersey or Guernsey*, but in such Vessels as truly
belong to Owners that are of *England, Ireland, Wales, Fer-*
sey or Guernsey, and 3 fourths at least of the Mariners are
to be *English*, upon forfeiture of Ship and Goods.

The Goods and Wares of those Plantations, and brought
in such manner as aforesaid, must be brought from those
very Countries of their several productions and growths,
from the Ports where they are usually shipped out, on
forfeiture of Ships and Goods.

XVIII. No Ship to go from Port to Port in *England*,
Ireland, Wales, Fersey, or Guernsey, or *Berwick*, unless the
Owners are Denizens or Naturalized, and the Master
and 3 fourths to be *English*.

All Owners must swear that their Vessels or Ships are
their own proper Ships and Vessels, and that no Foreigner
shall have any share or part in her, and must enter the same; and
that she was bought for a valuable consideration, *Bona fide*.

XIX. Nor to bring in any Goods from any place, but
that are of the growth of that very Country, or those
places which usually are for the first shipping, on pain of
forfeiture of their Vessel and Furniture.

This doth not extend so far, but that Masters may take
Goods in any part of the *Levant or Streights*, although
they are not of the very growth of the place, so that they
be imported in *English* Ships, 3 fourths *English* Mariners: So
likewise those Ships that are for *India* in any of those Seas

The like pro-
vision on the
like penalty is
for Goods of
Muscovy and
of the Domi-
nions and
Territories
of the Great
Czar or Em-
peror: So
likewise of
Currants be-
longing to the
Ottoman Ter-
ritories or
Dominions.

Note, In cases
of sickness,
death, captivi-
ty, salves the
Clause as to
Mariners.

That is those
that do not
belong to
English, Irish,
Welsh, or those
of Fersey or
Guernsey.

12 Car. 2. cap.
18.

to

to the Southward and Eastward of *Capo bona Speranza*, although the Ports are not the places of their very growth.

Any People of *England* may import (the Master and Mariners 3 fourths *English*) any Goods or Wares from *Spain*, *Portugal*, *Azores*, *Madera*, or *Canary* Islands; nay in Ships that are not *English* built: Bullion may be imported; so likewise in those that are taken by way of Prize, *Bona fide*.

But Sugars, Tabacco, Cottons, Ginger, Indicoes, *Frankincense*, or any other dying Wood of the growth of his Majestyes Plantations, to be shipped, carried or conveyed from any of the *English* Plantations, are to be carried to no place in the World, but are to come directly for *England*, *Ireland*, *Wales*, or *Berwick*, upon pain of forfeiture of Ship and Goods; and the Master is to give Bond with one Security in 1000 *l.* if the Ship be under the burden of 100 Tuns, and 2000 *l.* if above; that upon Lading he bring his Ship directly into *England*, *Ireland*, *Wales*, or *Berwick* (the danger of the Seas excepted) so likewise they are to do the same for the Ships that shall go from the Plantations at the Plantations to the Governour, upon forfeiture of the Ship and Goods.

Car. 2. c. 18.

XX. When the Master shall arrive at *Gravesend*, he shall not be above three days coming from thence to the place of discharge; nor is he to touch at any Key or Wharf till he comes to *Chester's Key*, unless hindered by contrary Winds, or draught of Water, or other just impediment to be allowed by the Officers: And likewise he or his Purser are there to make Oath of the Burden, Contents and Lading of his Ship, and of the Marks, Number, Contents and Qualities of every parcel of Goods therein laden to the best of his knowledge; also where and in what Port she took in her Lading, and what Country built, and how manned, who was Master during the Voyage, and what the Owners; and in Out-Ports must come up to the place of unlading, as the condition of the Port requires, and make Entries, on pain of 100 *l.*

Nor is such a Master to lade aboard any Goods or Wares to any place whatsoever, without entering the Ship at the Custom-House, of her Captain, Master, Burden, Guns, Ammunition, and to what place she intends, and before departure to bring in a Note under his hand of the very Merchant that shall have laid aboard any Goods together

14 Car. 2. c. 11.

12 Car. c. 18.

together with the marks and numbers of such Goods, and be sworn as to the same, on pain of 100 l.

No Captain, Master, Purser of any of his Majesty's Ships of War shall unlade any Goods before Entry made, on pain of 100 l.

Note, There is a List of all Foreign built Ships in the Exchequer, and that no Foreign Ship not built in any of his Majesty's Dominions of *Asia*, *Africa*, or *America* after Octob. 1. 1662. and expressly named in the List, shall enjoy the Priviledges of a Ship belonging to *England* or *Ireland*, although owned and manned by *English*, except only such as are taken by way of reprize, and condemnation made in the Admiralty as lawful Prize. None but *English* and *Irish* Subjects in the Plantations are to be accounted *English*.

XXI. If the Master shall have Freight from Port to Port within the Realm, he ought to have Warrant for the same, on pain of forfeiture of the Goods, and he is to take forth a Cocquet, and become bound to go to such Port designed for, and to return a Certificate from the chief Officers of that Port where the same is designed for, and discharged within six Months from the date of the Cocquet.

XXII. But from the *Netherlands*, or *Germany*, there may not be imported any sort of Wines (other than *Rhenish*) Spicery, Grocery, Tobacco, Pot-ashes, Pitch, Tar, Salt, Rosin, Deal-boards, hard Timber, Oil, or Olives in any manner of Ships whatsoever.

It might not seem impertinent, that this latter part which is abridged, in reference to matters publick, should be inserted; for that sometimes it may happen that an honest and well meaning Master or Skipper might innocently involve and hazard the loss of his Ship by committing acts against Laws positive and prohibitory; and though Masters and Mariners, *qua tales*, be not so exquisite as to know all that does belong to their Duties, or at least that which the Law lays incumbent on their Shoulders; yet for that most of them have some small glimmerings of the same, such hints in matters publick as well as private, may not only be of some advantage to them, but also to Merchants, who always upon the Miscarriages of the Masters, prove the greatest Sufferers; the offenders, for the most part, proving not sufficiently solvent.

CHAP. III.

Of Mariners, their several Offices and Immunities, and of Barratry committed by them.

- I. *The several Marine Officers on Ship-board, and their Charges and Duties.*
- II. *Of the Masters power and authority over them, as in relation to punishing or otherwise.*
- III. *The Duty that Mariners owe to each other, and they to the Ship.*
- IV. *Their attendance requisite when laded; and if detriment, where to be responsible.*
- V. *When Accidents befall them, where they ought to be look'd after, and at whose costs.*
- VI. *The Mariners Oath where requisite to the discharging of the Master.*
- VII. *What Accidents do destroy, and what not, their wages.*
- VIII. *Where they may joyn all in a Suit for the recovery of their Wages, and where not.*
- IX. *Of their Wages where liable to answer damage.*
- X. *Where they absolutely lose their Wages.*
- XI. *Of Money or Goods taken up by a Mariner, where it shall be deliver'd, and where a Discount of his Wages.*
- XII. *And of their becoming liable to correction.*
- XIII. *Barratry in the Mariners, the reason why the Law imputes offences in them to be answered by the Master.*
- XIV. *In what cases the Master shall become liable for the Actions of his Mariners.*
- XV. *Of Goods purloyned before they are brought on Ship-board, where the Master is bound to answer, and where not.*
- XVI. *Of the Antiquity of such Custom.*
- XVII. *Of Goods brought secretly in on Ship-board, if purloyned, where the Master is not made liable.*
- XVIII. *Of Caution or fore-warning where the same shall excuse the Master.*
- XIX. *Where the Master shall be liable, notwithstanding such Caution.*

I. **T**HE persons ordinary for sailing in Ships have divers denominations: The first, which is the Master known to us and by most Nations both now and of old, and especially by the Roman Laws, *Navicularius* or *Magister Navis*; in English render'd Master; or *Exercitor Navis* in the Teutonick Skipper; by the Grecians, *Navarchus* or *Nauclerus*; by the Italians *Patrono*. But this is only

*Leg. 1. & pas-
sim ad Leg.
Rhod. & lib. 1.
parag. 2. Naut.
Camp.*

those Vessels that are Ships of Burden and of Carriage ; for to Ships of War the principal there is commonly called Commander or Captain. The next in order of Office to the Master, is he who directs the Ship in the Course of her Voyage, by the *French* called *Pilote* ; by the *English* and *Dutch* called *Steersman* ; by the *Romans*, *Gubernator* ; by the *Italians*, *Nochiero Pilotto* and *Nauarchus*, as *Gerettus* writes. The third is esteemed the Masters Mate or Companion, chiefly if the Master be Steersman himself ; of old by the *Græcians* and *Romans* called *Proreta* ; his charge is to command all before the Mast.

Vid. Leg. Consol.

His Successor in order is the Carpenter or Shipwright, by those two Nations of old, called *Naupegus* by the latter ; by the first *Calaphates* ; from the Loins of one of that Rank sprang that great Emperour *Michael*, surnamed *Calaphates*, who denyed not to own the quality of his Father among his Regal Titles. The very Name of *Calaphate* the *Venetian* and *Italian* still use to this Day.

The Father was of *Phalagonia*, as *Egnatius Volateranus* observes lib. 23.

The next who succeeds in order, is he who bears the Charge of the Ships Boat, by the *Italians* called *Brachiere* ; by the *Græcians* and *Romans*, *Carabita*, from *Carabus*, which denotes the Boat of a Ship.

The sixth in order, especially in Ships of Burden, is the Clerk or Purser, by the *Italians* called *Scrivano*, whose Duty is the registering and keeping the Accounts of all received in or delivered out of the Ship ; for all other Goods that are not by him Entred or taken into Charge, if they happen to be cast over-board in a Storm, or are stoln or imbezled, the Master answers them not, there being no Obligation on him by Law for the same ; his Duty is to unlade by Day, not Night.

Ill Consolato Stat. 14 Cap. 2. cap. 11.

The seventh a most necessary Officer as long as there are aboard Bellies, sharp Stomachs and Provision, called the Cook.

The eighth is the Ship's Boy, who keeps her continually in Harbours, called of old by the *Græcians*, *Nauphilakes* ; by the *Italians*, *Guardino* : These Persons are distinct in Offices and Names, and are likewise distinguished in their Hires and Wages ; the rest of the Crew are under the common Name of Mariners, by the *Romans* called *Nautæ* ; but the *Tarpollians*, or those Youths or Boys that are Ap-

Sudaus ad Leg. 1. Naut. Cap. 101.

prentices, obliged to the most seivile Duties in the Ship, were of old called *Mesonautæ*.

II. The Master hath the supreme Rule on ship-board, and by that Means his Power and Authority is by Law much countenanced, especially in the keeping his Crew in Peace so long as they eat his Bread ; and if a *Mariner* shall happen to be bruised or hurt in doing his Duty and Service, the Master * is to take Care that he be carefully look'd after, in order to the procuring his Recovery ; and if it be occasioned by the Miscarriage of another on Ship-board, he may refund the Damage out of his Wages, but still remembring who gave the first Assault.

* Per. Leg.
Oleron, cap. 6.

Pe Leg. de ex-
erc. act. & l.
in fin. Naut.
Caup.

If it happens that the Master commands his Boat to be manned out, and it so happens that the same is out of order, or unfit to take the Sea, the Tews, or other Accoutrements being Impotent, if the *Mariners* happen to be drowned, the Master is to repay by the Law *Marine* one whole Year's Hire to the Heirs of the drowned : Therefore Masters ought carefully to view and see that the Boat be fit for Men to trust their Lives in upon his Command.

Pir Leg. Ole-
ron, cap. 14.

If a *Mariner* shall commit a Fault, and the Master shall lift up the Towel three times before any *Mariner*, and he shall not submit, the Master at the next Place of Land may discharge him ; and if he refuseth to go ashore, he shall lose half his Wages, and all his Goods within the Ship. If the *Mariner* shall submit, and the Master will not receive the same, he shall have his whole Wages ; or if the *Mariner* shall depart the Ship on the Master's Command, and the Master happens not to take another, if any Damage happens to Ship or Goods, the Master must answer.

Per Leg. Ole-
ron, cap. 13.
& per Leg.
Denmarc.

III. *Mariners* must help one another at the Sea and in Port ; if any refuse, upon the Oaths of his Fellows, he loseth his Wages. None of the Crew must or ought to leave the Ship, without Leave of the Master, when she comes to a Port, or rides at Anchor, but always constantly to wait upon her till they are discharged, or have leave, at least half to be left on Ship-board.

Leg. nemo de
Reg. jar. &
Leg. plerumq;
de in jus. vcc.

A *Mariner* may not carry out of the Ship above one Meal's Meat, but Drink not a drop ; and when on Ship-board, ought not to be there arrested for Debt, but on-ly

by so much of his Wages in the Hands of the Master attached: Yet this is doubted, if it be not on a sworn Debt, that is, a Judgment or Sentence, or a Penalty to the King.

They ought not to depart from ~~on~~ Ship-board when once admitted into their full Pay (which is always when they break Ground) without Licence of the Master; and before they may so do, they are to leave a sufficient number to guard the Ship and Decks.

See the several Acts of the 7th and 8th *William III.*

Cap. 21. Intituled an Act for the Encrease and Encouragement of Seamen; and of the 8th and 9th of the same King, Cap. 23. Intituled an Act for the further Encrease and Encouragement of Sea-men, for registering of Seamen, and providing for their Widows and Children in such manner as therein is mentioned, too large to be recited here.

IV. If the Ship breaks Ground, and is set sail, if after she arrives at her desired Port, their full Pay continues till she returns; nor may they in any wise depart from on Ship-board without Leave or Licence of the Master; if they do, and any Disaster happens, they must answer: Yet at such Port if the Vessel be well moored and anchored with two Cables, they may go without leave, yet so as they leave a sufficient number behind to guard the Decks: But then their return must be in due season; for if they make longer stay, they must make satisfaction.

Leg. Oleron;
cap. 5.

V. If *Mariners* get drunk and wound one another, they are not to be cured at the Charge of the Master or Ship; nor such Accidents are not done in the Service of the Ship: But if any of the *Mariners* be any ways wounded, or do become ill in the Service of the Ship, he is to be provided for at the Charges of the Ship; and if he be so ill as not fit to travel, he is to be left ashore, and Care to be taken that he hath all Accommodations of Humanity administred to him: And if the Ship is ready for Departure, she is not to stay for him; if he recover, he is to have his full Wages deducting the Master's Charges which he laid out for him.

Leg. Oleron;
cap. 1.

VI. In Case of Storm if Goods are cast over-board for lightning the Ship, the Oaths of the *Mariners*, swearing

Leg. Oleron;
cap. 11.

that it was done for the Preservation of the Vessel and the rest of the Lading, shall discharge the Master.

So Goods damnified at Sea, are cleared by the Oath of the Master and *Mariners*, by the Laws of *Oleron*.

Leg. Oleron.
cap. 13.

To assault the Master on Ship-board, is a Crime that subjects the *Mariner's* Hand to be cut off, unless he redeems it at 5 *Solz*.

Consolat. del.
mere.

Trin. 7 Jac.
B. R. Abridg.
Ross, fol. 530.

VII. If a Ship happens to be seized on for Debt, or otherwise to become forfeited, the *Mariners* must receive their Wages, unless in some Cases where their Wages are forfeited as well as the Ship; as if they have Letters of *Mart*, instead of that they committed Piracy, by reason of which there becomes a forfeiture of all; but Lading of prohibited Goods aboard a Ship, as Wool, and the like, though it subjects the Vessel to a Forfeiture, yet it disables not the *Mariner* of his Wages; for the *Mariners* having honestly perform'd their Parts, the Ship is tacitly obliged for their Wages: But if the Ship perishes at Sea, they lose their Wages, and the Owners their Freight. And this being the Marine Custom, is allowed by the *Common Law* as well as the *Civil Law*.

VIII. The Courts at *Westminster* have been very favourable to *Mariners* in order to the suing for Wages, for at the *Common Law* they cannot joyn, but must sue all distinct and apart for their Wages.

1. Vent. 146.
343. 2 Vent.
181.
2 Keble 779.
† Jones versus
the poor Ma-
riners. Winch.
Rep. 8.

Yet in the Admiralty they may all joyn, and the Courts at *Westminster* will not grant a Prohibition: And so it was rul'd where one *Jones* † a Master of a Ship was sentenced in the Admiralty for Wages at the Suit of Poor *Mariners*, a Prohibition being prayed upon a Suggestion that the Contract was made at Land, and not *super altum mare*; the Court denied it, for that he came too late, Sentence being given below against him: Yet if the *Mariners* had only libelled, and there had been no Sentence, and the Defendant had prayed a Prohibition, as above, yet the Court would have denied it. This hath been, and is usually done.

Salk. 33. pl. 4.

It was by meer Indulgence that *Mariners* were permitted to sue in the Admiralty for their Wages: And this Indulgence was, because the Remedy in the Admiralty was the easier and better; easier, because they must sever here, whereas they may joyn there; and better

better, because the Ship it self is answerable : but it is expressly against the Statute, tho' now *Communis Error facti Jus*. The first instance of it is in *Winch* 8. Yet it was never allowed the Master should sue there ; nor is it reasonable where he commenceth the Voyage as Master ; for tho' the Mariners contract upon the Credit of the Ship, the Master doth contract on the Credit of the Owners.

But yet the Mate may sue in the Admiralty for his Wages, because he Contracts with the Master, as the rest of the Mariners do. *Salk. 33. pl. 5.*

But the Court will be very well informed, that the Libel is for *Mariners Wages* ; for some who work Carpenter's work and such like Labour aboard a Ship in a Haven or Port within the Realm (which is *infra Corpus Comitatus*, notwithstanding those great and ingenious Objections against it) and must be tried by the *Common Law*, and not elsewhere) will libel under that Cloak for *Mariner's Wages*. But the Court in that case will grant a Prohibition. And so it was done in the like Case. *Sitwell & al. Owners of a Ship vers. Love & al. Mich. 27 Car. in B.R.*

But if a Ship rides at Anchor in the Sea, and the Master sends his Boat ashore for Victuals or other Provisions for the Ship, and accordingly the *Providore* or Slop-seller does bring Victuals and Provisions aboard ; in that Case if the Contract be made there, it must be sued for in the Admiralty : But if the Goods are by the Purser or *Mariners* contracted for at Land, they must sue at *Common Law*. *Latch. fol. 11. Hill. 1 Car. in B.R. Godfrey's Case.*

IX. If Goods are so Imbezled, or so Damnified that the Ship's Crew must answer, the Owners and Master must deduct the same out of their Freight to the Merchants, and the Master out of the Wages of the *Mariners* ; for though Freight is the Mother of Wages, so is it the very Father of Damage ; For before the *Mariner* can claim his Wages out of what the Ship hath earn'd, the Ship must be acquitted from the Damage that the Merchant hath sustained by the Negligence or Fault of the *Mariners* : And the reason is, for that as the Goods are obliged to answer the Freight, so the Freight and Ship is tacitly obliged to clear the Damage ; which being done, the *Mariners* are then let in to their Wages.

Leg. Oleron.

X. If a Mariner be hired, and he deserts the Service before the Voyage ended, by the *Law Marine* he loses his Wages : And the same Custom at *Common Law* pleaded, it hath been conceived will bar him.

If a *Mariner* shall commit any wilful or negligent Fault, by reason of which the Master, Owners, or the Ship answers Damage to the Merchant, an Action lies well against him.

1 Sid. 236.

In a Suit for Mariners Wages 'twas agreed, That if the Ship do not return, but perishes by Tempest, Enemy's Fire, &c. the Mariners shall lose their Wages; for if the Mariners shall have their Wages in these Cases, they will not use their best Endeavours, nor hazard their Lives to preserve the Ship, 1 Sid. 179. But if the Ship unlade, they shall have their Wages; in the Case of *Cullen* and *Mico*, 1 *Keeble* 831.

XI. If a *Mariner* takes up Monies or Clothes, and the same is entred in the Purser's Book, by the Custom *Marine* it is a Discount or a Receipt of so much of their Wages as the same amounts to; and in an Action brought by them for their Wages, the same shall be allowed, and is not accounted mutual, the one to bring his Action for the Clothes, and the other for his Wages.

Pasch. 27 Car.
in *B. R. Pidge-*
on adfect. Ar-
gee per L. C.
J. Hales.
Leg. Oleron.
cap. 13.

XII. A Master of a Ship may give moderate and due Correction to his *Mariners*, and if they bring an Action against him, he may justifie the same at the *Common Law*; and by the *Law of Oleron*, if a *Mariner* shall assault the Master, he is to pay 5 *Solz*, or lose his Hand.

Per Leg. Ole-
ron. cap. 18.

Mariners after they have unladen the Ship, if they demand their Wages, and there be any Intention of their Departure, the Master may detain a reasonable Proportion of the same till they bring back the Ship, or give Caution to serve out the whole Voyage.

XIII. *Barratry* of the *Mariners* is a Disease so Epidemical on Ship-board, that it is very rare for a Master, be his Industry never so great to prevent it; a Span of Villany on Ship-board soon spreads out to a Cloud, for no other Cause but of that circular Encouragement that one knavish *Mariner* gives another.

Just. de ob.
jue ex dilect.
S. Fin.

However the Law does in such Cases impute Offences and Faults committed by them to be *Negligences* in the Master; and were it otherwise, the Merchant would be in a very dangerous Condition. The

The Reasons why they ought to be Responsible, are, for that the *Mariners* are of his own chusing, and under his Correction and Government, and know no other Supremacy on Ship-board but himself; and if they are Faulty, he may correct and punish them, and justify the same by Law: And likewise if the Fact is apparently proved against them, may reimburse himself out of their Wages.

XIV. And therefore in all Cases, wheresoever the Merchant loads aboard any Goods or Merchandise, if they be Lost, Imbezled, or any other ways Damnified, he must be Responsible for them; for the very lading them aboard makes them liable, and that as well by the *Common Law* as the *Law Marinae*.

XV. Nay, if his *Mariners* go with the Ship-Boat to the Key or Warfe to fetch Goods on Ship-board, if once they have taken Charge of them, the Master becomes immediately Responsible, if they Steal, Lose, Damnify or Imbezle them.

XVI. The ancientest Record that is found extant, is that in *Edward* the Third's time, where one brought an Action of Trespass against the Master for the Imbezlement by his *Mariners* of twenty two Pieces of Gold, Bow, Sheaf of Arrows, Sword, and other things, and adjudged he should answer. And for that the same is or may be of great Moment, accept of a Transcript of the Record, as the same was certified into *Chancery*, in order to have it sent into the *King's Bench*, to enable the Plaintiff to bring an Action upon the same judgment in any Place in *England*, where he could meet with the Defendant.

Venerabili in Christo Patri Domino J. Dei gratia Wygorn' Episcopo Domini Regis Ed. Cancellario bel ejus locum tenenti sui humiles & devoti, Robertus Grene, Major Ville Bristol, Edwardus Blankeit, & Johannes de Castlezacke Ballivi libertatum ejusdem Ville, salutem cum omni reberentia & honore. De tenore & Recordi & processus loquere que fuit coram nobis in Cur' Domini Regis ibidem sine brevi inter Hen. Pilk & Jurda-num Menore Magistrum Pavis vocat la Graciane de Bayoue in pl'ito transgress' prout per breve Domini Regis nobis

Pasch. 11. Jac
in B. R. Hern
versus Smith.
RollsAbridg.
530.

Naut. Caup.
Stat. Leg. 1.
S. 3, 6, & 7:
1 Ven. 190, 238.
Raym 220.
1 Mod. 85.
2 Lev. 69.

Gloss. supered. Self. verb.
& factum.

Brevia Regis
in Turre Lon-
don Trin Anna
24 E. 3. n. 45.
Bristol.

nobis directum fuit vobis inde certificatur, sub sigillis nostris vobis si placet mittimus in hiis scriptis. Ad placitum Tolls tent ibidem die Martis proximo post Festum Epiphaniæ Domini anno Regni Regis nunc 24 Hen. Willk querit opt. se versus Iordanum Venozæ Magistrum Navis vocat' la Graciâne de Bayone de pl'ito transgressus per pl' &c. & unde querit, quod secundum legem & consuetudinem de OLERON unusquisque Magister Navis tenetur respondere de quacunque transgressus per servientes suos in eadem factus, & Johannes de Rule & Barcolet de Bornes servientes predicti Iordani Magistri Navis predictæ die Martis, proximo ante Festum omnium Sanctorum Anno Regni predicti Regis Ed. 23. in Marii iuxta Britan. in eadem navi de Johanne de Cornub' servient' predict' 22 libr' in auro, arcus, sagittæ, gladius & alia bona & catalla ad valentiam 40 l. ceperunt & asportaverunt injuste, &c. ad dampnum predict' Hen. 60 l' & si predictus Iordanus hoc velit deducere, predict' Hen. paratus est verificare, &c. Et predictus Iordanus venit & dicit quod lex de Oleron talis est quod si aliqua bona & catalla Magistro alicujus Navis liberata sunt custodiend', unde idem Magister pro eisdem vel pro aliqua alia re in eadem navi facta manucap', illo modo Magister Navis tenetur respondere; non alio modo, & super hoc petit Iudicium. Et predict' Hen. dicit, quod unusquisque Magister tenetur respondere de quacunque transgressione per servientes suos in Navi sua facta, & petit Iudicium simile. Et super hoc predict' partes habent diem huius die Sabbati proximo post Festum sci. Hillarij proximo futurum ad audiendum Iudicium suum, &c. Ad quem diem predictæ partes venerunt & petierunt Iudicium suum, &c. Et recitatur Recordo & processu predictis in plena Curia coram Majoribus & Ballivis & aliis probis hominibus Ville & Magistris & Marinariis, visum fuit Curtee, quod unusquisque Magister Navis tenetur respondere de quacunque transgressione per servientes suos in Navi sua facta. Ideo consideratum est, quod predict' Hen. recuperet dampna sua 40 l' versus predict' Iordanum per Cur. taxat' & nihilominus idem Iordanus transgressione predicta in misericordia.

The Judgment in this Case is according to Law, and ought not to

have been a *capiatur*; for it is not such a Trespass as the King is Entitled to a Fine. Vide 2 Cro. 224. Beedle versus Moris, 7 Jac. Co. Entries the same, fol. 347.

XVII. The Master subject to answer Damage, is to be understood in all such Cases where the Lading was brought aboard either by his Consent or his Purser's; for any other, or such as shall be secretly brought in, not being entred in the Purser's Book, or in the Bills of Lading, the Master is not obliged to see forth-coming, unless it be such Goods as the Parties bring into the Ship about them, as Clothes, Money, and the like, as above, those things being seldom entred, yet most commonly those that are visible, the Master by Law is Responsible for.

*Leg. 1. in fin.
Naut. Caup.
per leg. itaque
de furtis.*

XVIII. So likewise if a Master forewarn a Passenger to keep his Goods, and that he will no ways take Care of them, and if they be lost or purloyn'd by the Crew, he will not be obliged to see them forth-coming; the Master is not there held Responsible in Case of a Loss, especially if there be any thing of Agreement thereunto.

*Eod. Leg. in
fin. Naut.
Caup. & per
leg. itaque de
eod. edit.
Bart. & Fason
in leg. non so-
lum.*

XIX. But if Goods shall be sent aboard a Ship, and the Master shall appoint a Cabin for the same, and deliver the Key to the Lader, and tell him he will not be Responsible if a Loss happens; yet if the Goods are stole, he must notwithstanding make Satisfaction: By the Common Law it shall bind an Inn-keeper. *Mo. 78.*

*S. mortem de
non oper.*

But if the Inn-keeper desires his Guest to put his Goods in such a Chamber under Lock and Key, &c. and then he will warrant, otherwise not, and the Guest leaves them in an outer Court, where they are stole, &c. the Inn-keeper shall not be charged.

*8 Co. 33. a.
Mo. 158.*

Note, That Goods once delivered to a Master, the Cargo is not subject to be attached in his Hands, nor can any Custom whatsoever support the same; for they are in Law as it were bailed to the Ship, until the Freight and all other Charges are paid: And very much doubted whether an Attachment can be made in London of any Goods at all lying on Ship-board in the River of Thames, (which, though the Port of London) notwithstanding Freight and all other Charges are paid off.

*Mich. 27 Car.
2 per Lord
Chief Justice
Hales.*

CHAP. IV.

Of Freight, Charter-parties, and Demorage.

- I. *The various ways that Ships may be freighted at this Day.*
- II. *The ancient way of Freighting.*
- III. *How the same is governed upon the various Contrasts, and of Accidents happening to Masters or Laders preventing the Voyage.*
- IV. *Of Agreements parol and in Writing, how construed by the Common Law; what it is.*
- V. *Of Ships laded and unladed before the Voyage begun; their becoming disabled, viz. perish in the Voyage before the same is completed.*
- VI. *Of Ships departure considered in reference to Freight and Damage.*
- VII. *Of Freight arising on Trading Voyages, and lost by contingent Actions, considered by the Common Law, and the Law Marine.*
- VIII. *Of Freight becoming due upon the various ways of Contrast, or general where none was agreed for.*
- IX. *Of Faults arising from the Freighters; and of the Decease of the Ship in reference to Freight.*
- X. *Faults of Masters arising from taking in Goods more than were contracted for; and of being forced into Ports in his Passage.*
- XI. *Passengers dying, the Ships Title to their Goods and Concerns.*
- XII. *The Ship in construction of Law how far liable to Freight.*
- XIII. *Ships taken and retaken in War, whether the same destroys the Contrast.*
- XIV. *Goods become lost without Fault of the Ship, whether Freight becomes due.*
- XV. *Of Freight contracted with Persons deficient.*
- XVI. *Of Ships contracted for by the Month, to be paid at the Arrival at a Port; Ship is cast away, the Goods saved: Whether the Freight ought to be paid.*
- XVII. *Covenant mutual in a charter Party, shall not be pleaded the one against the other. Plea that answers to Part only is ill. Covenant therein by several, yet brought against one only. Covenant by several & quemlibet eorum, may be brought against one only.*

I. **I**N the Freighting of Ships, respect is always had to the Ship it self, or else to a certain Part thereof.

Again, the Merchants either Freight her by the Month, or the entire Voyage, or by the Tun; for it is one thing to Freight a Ship, and another thing to take certain Tunnage to Freight.

So also it is one thing to be a Cape-Merchant, another to be an under Freighter.

II. There was of old another way of Freightings, which was when the Merchant agreed with the Master for a Sum certain to convey his Goods ensured against all Peril; such were to be responsible if any Detriment or Loss happened; but that is now become obsolete.

21 E. 3 Cor-
ton's Abridg-
ment of the
Parliament
Records, fol.
63.

III. Freight is governed generally by the Contract, and varies according to the Agreement, reduced generally into a Writing commonly called a Charter-party, executed between the Owners and Merchant, or the Master in the behalf of himself and Owners, or himself and the Merchant, or between them all, or else is Parol.

Naut. caup.
Stab. &c. Leg.
1. S. quancun-
que vim. Si
quis navem
conduxerit, in-
strumenta con-
signata sunt.
Pekius com.
ad Leg. Rhod.
Art. 20.

The Master or Owners generally covenant to provide a Pilot and all other Officers and Mariners, and all other things necessary for the Voyage; and for the taking in and delivering out of the Lading.

If there be an Agreement and Earnest, but no Writing, if the same be broke off by the Merchant, he loseth his Earnest; but if the Owners or Master repent, they lose double the Earnest.

Per Leg. Na-
val. Rhod.
Art. 19.

But by the Common Law of England, the Party damnified may bring his Action of the Case, and recover all Damages on the Agreement.

Mich. 10. Car.
in B. R. Lang-
don and Stock's
Case. 1 Cra.
fol. 383. Per
Leg. item S.
Si in Leg.
loca.

If a time be appointed by the Charter-party, and either the Ship is not ready to take in, or the Merchant not ready to lade aboard, the Parties are at Liberty, and the Party Damnified hath his Remedy against the other by Action, to recompence the Detriment.

If Part of the Lading be on Ship-board, and it happens some Misfortune may overtake the Merchant that he hath not his full Lading aboard at the time, the Master is at liberty to contract with another, and shall have Freight by way of Damage for the time that those Goods were aboard after the time limited; for such Agreements being of a Conditional nature Precedent, a Failure as to a compleat Lading, will determine the same, unless afterwards affirmed by Consent. And though it be no Prudence for every Merchant or every Master to depart from the Contract, if it should so fall out that the Agreement as to the Lading is not performed according to Promise, (seldom or ever done if any Part be aboard) yet it is the

the highest Justice, that Ships and Masters should not be Infettered but Free, for otherwise by the bare lading of a Cask or Bale, they might be defeated of the Opportunity of Passage or Season of the Year.

Mich. 10 Car.

in B. R. Lang-

don and Stock's

Case, Cro. 1.

part, fol. 383.

3 Lewinz. 238.

Per Leg. si ex

conduct. &

Leg. si item fun-

du; & Leg. hæc

distinctio.

Per Leg. Ole-

ron. cap. 21.

Art. 25. Legem

Naval. Art.

29. eod.

(a) 1 Mod. 85.

Raym. 220.

1 Ven. 190,

238.

2 Keb. 866.

3 Keb. 72, 112,

132, 135.

So on the other hand, if the Vessel is not ready, the Merchant may ship aboard in another Vessel the Remainder of his Goods, and discharge the first Skipper, and recover Damages against the Master or Owners for the rest. This is grounded upon the like Reason as the former.

And therefore by the *Law Marine*, Chance, or some other notorious Necessity will excuse the Master; but then he loseth his Freight till such time as he breaks ground, and till then he sustains the Loss of the Ship.

But if the Fault be in the Merchant, he then must answer the Master and the Ship's Damage, or else be liable to entertain the Ship's Crew ten Days at his own Charge; but if after that, then the full Freight: And if any Damage happens afterwards, the Merchant must run the Risque of that, and not the Master or Owners. (a) But by the *Common Law*, so long as the Master hath the Goods on Ship-board, he must see them forth-coming.

IV. *Charter-parties* have always, by the *Common Law*, had a genuine Construction as near as may be, and according to the Intention and Design, and not according to the literal Sense of Traders, or those that Merchandize by Sea, yet they must be regularly pleaded; and therefore in an Action of Covenant on an Indenture dated 8th Oct. 38 El. wherein was recited, whereas by Indenture of *Charter-party* dated Sep. 8. 38 Eliz. between the Plaintiff and Francis Cherry; the Plaintiff having hired of him a Ship, for a Voyage to *Dantzick*, upon taking the Ship it was agreed between them, that the Ship should be laden with Corn to *Dantzick*, and to sail to *Leghorn*. Now by the said Indenture, in Consideration the Plaintiff had agreed that the Defendant should have the Moiety of Corn *quod tunc fuit*, or afterwards should be laden in the Ship during the said Voyage, the Defendant covenanted to pay the Moiety of the Money for the said Corn, *quod tunc fuit* it, or afterwards should be laden, &c. and alledgeth *in facto*, that Oct. 9. 38 Eliz. the Ship was laden with 60 Lasts of Corn, and for not Performance of this Covenant the Action was brought; the Defendant pleaded that

the Deed was sealed and delivered O^r. 28. 38 Eliz. & *quod ad tunc vel postea* there was not any Corn laden there, and traverseth the Delivery O^r. 9. or at any Time afterwards before the 28 O^r. 38 Eliz. And it was adjudged upon Demurrer, That in regard the Plaintiff declared upon a Deed dated O^r. 9. 39 Eliz. it shall be intended to have its Essence and Delivery at that time, and no other; and if he should confess it to be delivered at any other time, it would be a Departure from his Declaration, and the Word *tunc* is referred to the Delivery, and not to the Date; and if it were Delivered ten Months after the Date, he should not have the Benefit of the Corn laden before the delivery: And therefore the Defendant was adjudged not to be charged with paying for any Corn before the Delivery of the Deed, the Words of the Deed being, that he should pay for the Corn then laden, &c. which (*then*) is referred to the time of the Essence of the Deed by the Delivery, and not to the Date.

Mich. 8 Jac. in B. R. Offely vers. Sir Baptist Hix, Cro. 2. part, fol. 263.

Atkinson did Contract with Buckle for the Carriage of 100 Quarters of Barley, and did promise to deliver unto him the 100 Quarters of Barley, a Ship-board at Barton Haven, in the County of York, to carry them for him, and for the Carriage thereof did promise to pay to him so much; and Buckle promised to carry the same for him, and accordingly brought his Ship to the said Haven, expecting there the Delivery of the 100 Quarters of Barley; but Atkinson came not to deliver the same to him, whereupon Buckle brought his Action of the Case upon the promise, and upon *non assumpsit* pleaded had a Verdict and Judgment, which was affirmed upon a Writ of Error.

3 Bulst. 152. 1 Ro. 312.

Charter Party & *Charta partita*, is all one in the Civil Law, with an Indenture at the Common Law. It settles the Agreement and Bills of Lading, the Contents of the Cargo, and binds the Master to deliver them well Conditioned at the place of discharge, according to the Contents of the Charter Party or Agreement; and for Performance, the Master obliges Himself, Ship, Tackle, and Furniture, to see the same done and performed.

What it is. Vide Cow. Interp. verb. Charter party.

Covenant upon a Charter Party between Bolton Owner, and Lee and Morgan Merchants, Freighters of a Ship, by which Bolton put to Freight the Ship in a Voyage to Guinea at 48*l.* per Menssem, and there was a mutual

Covenant inter A. of the one Part, and B. and C. on the other, &

quemlibet eorum, and the Action brought against one only, and well.

Covenant between the Parties & *quemlibet eorum modo sequente*, and then divers Covenants follow concerning the Ship's Tackle and Performance of the Voyage; and then a Covenant for the Payment of the Freight (*viz.*) when the Ship arrived at *Guinea*, the Freight then due was upon Notice to be paid in *England*, and when she arrived in *England* the Residue from the time of the last Payment was to be paid. And saith that at such a time the Ship arrived, and that 6 Months and 10 Days were then past, which came to so much, whereof Notice was given; and that after such a time the Ship arrived at *England*, and that the Freight for 6 Months, from the time of the last Payment, and the Freight came to 287*l.* 4*s.* and that the Defendant had not paid any of the Sums, upon which the Defendant demurred. And took these Exceptions to the Declaration.

1 *Mod. Cas.* 154:
Salk. 393. pl. 2.

1. For this that the Action is brought against one of the Defendants only, omitting the other, *sed non allocatur* the Covenant being between them & *quemlibet eorum* is joyn't and several of every Part.

2. For that it appears upon Computation, the Plaintiff demanded more upon the first Breach than is due by 30*s.* and less than is due upon the second by 16*s.* and tho' that the first may be cured by the Juror's finding less, or by the Plaintiff's releasing the Overplus, yet where he demands less than his due, it is incurable; and cited several Books there quoted for that purpose in *Assumpsit*, where, as in this Case, only Damages are to be recovered; and on the other Part was cited 2 *Cro.* 498. *Pemberton & Shelton*, & 529. *Parker & Curson & uxor.* see like 2 *Levins* 4. *Hulme & Sambers*, and 2 *Vent.* 129. *Welby & Phillips*, *Hale Ch. Justice* took a Difference between this Case of Covenant and Debt, and held that after Verdict it had been cured without question, but upon Demurrer there may be some Doubt, the Demurrer being general, but had the Demurrer been special it had been ill, and ruled Judgment, *pro Quer. Bolton & Lee*, 2 *Levinz.* 56. & 3 *Keeble* 39. & 50.

V. If Goods are fully laded aboard, and the Ship hath *Ad Leg. Rhod.* broke Ground, the Merchant on Consideration afterwards resolves not on the *Adventure*, but will unlade again; by the *Law Marine* the Freight is due.

And

And if the Ship in her Voyage becomes *unable* without the Masters Fault, or that the Master or Ship be Arrested by some Prince or State in her Voyage, the Master may either mend his Ship, or Freight another.

Judg. Oleron:
Leg. ult. ad
Rhod.

But if the Merchant will not agree to the same, then the Freight becomes due for so much as the Ship hath Earned; or otherwise the Master is liable for all Damages that shall happen. And therefore if that Ship, to which the Goods were translated, perished, the Master shall answer; but if both the Ships perish, then he is discharged.

Digest. Paulat:
l. 14. c. 2.
§. 10.

But if there be extream Necessity, as that the Ship is in a sinking Condition, and an empty Ship is passing by, or at hand, he may translate the Goods; and if that Ship sink or perishes, he is there excused: But then it must be apparent that that Ship seemed Probable and Sufficient.

VI. If a set time be fixed and agreed upon between the Merchant and the Master, wherein to begin and finish his Voyage, it may not be altered by the *supra* Cargo, without special Commission for that Purpose.

Leg. qui Romæ
Sect. Callima-
chus, ff. de
verb. obl.

If a Master shall weigh Anchor, and stand out to his Voyage after the time covenanted or agreed on for his Departure, if any Damage happens at Sea after that time, he shall refund and make good all such Misfortune; yet if a Charter-party is made, that the Plaintiff shall sail from London to Lisbon with the first Wind and Opportunity, &c. in Consideration of which the Merchant did covenant to pay so much for Freight; the Ship departs not with the first Wind and Opportunity, yet afterwards breaks Ground, and arrives at her Port, the Freight in this Case is become due; for there is nothing can bar the Ship of her Freight but the not Departure, for only that in Law is traversable, being material to avoid the Payment of Freight; but to say the Ship did not depart with the next Wind, is but a Circumstance which in strictness of Law is not traversable.

Popham. 1613
Palm. 398.
Latch. 12. 49.

If it be agreed that the Master shall sail from London to Leghorn in two Months, and Freight accordingly is agreed on, if he begins the Voyage within the two Months, tho' he does not arrive at Leghorn within the time, yet the Freight is become due.

Angl. Alex. &
Jason in dict.
S. Callimachus.

VII. If the Ship is freighted from one Port to another Port, and thence to a third, fourth, and so home to the Port

Leg. Relegati.
ff. de panis &
Leg. ult. de
Sep. vio.

Port from whence she first sailed, (commonly called a *Trading Voyage*) this is all but one and the same Voyage, so as it be in the Conformity to the *Charter-party*.

Trin. 9. Jac. in C. B. Rot. 638. Bright versus Cooper, Brown. 1 part 21. A Merchant agrees with a Master, that if he carries his Goods to such a Port, he will then pay him such a Sum; in the Voyage the Ship is assaulted, entred and robb'd by Pirates, and part of her Lading taken forth, and afterwards the Remainder is brought to the Port of discharge, yet the Sum agreed upon is not become due, for the Agreement is not by the Master performed.

But by the *Civil Law* this is *vis major* or *casus fortuitus*, there being no Default in the Master or his Mariners, and the same is a Danger or Peril of the Sea, which if not in Naval Agreements exprest, yet is naturally implied: For most certain, had those Goods, which the Pirates carried away in stress of Weather, *Navis levandæ causa*, been thrown over-board, the same would not have made a Disability as to the Receipt of the Sum agreed on; for by both the *Common Law* and the *Law Marine*, the Act of God, or that of an Enemy, shall no ways work a Wrong in Actions private.

Co. 1 part. 97. Shelley's Case. Reginer and Fogassa's Case. Plowden com. VIII. If a Ship be freighted by the Tun, and she is full laden according to the *Charter-party*, the Freight is to be paid for the whole; otherwise but for so many Tun as the Lading amounted to.

Leg. si quis Cod. de justit. & substit. If Freight be contracted for the lading of certain Cattel, or the like, from *Dublin* to *West-chester*, if some of them happen to die before the Ship's Arrival at *West-chester*, the whole Freight is become due as well for the dead as the living*.

* *Arg. Leg. scio ff. de annis legat. & leg. illis libert. in fin. ff. de condit. & demon. Arg. 7. † Leg. qui operas & Leg. si ades S. cum quidam & S. fin. ff. locati Leg. sed & addes in S. Si quis mulierem ff. locat.* But if the Freight be contracted for the transporting them, if Death happens, there ariseth due no more Freight than only for such as are living, at the Ship's Arrival at her Port of Discharge, and not for the Dead †.

If the Cattel or Slaves are sent aboard, and no agreement is made either for lading or transporting them, but generally, then Freight shall be paid as well for the Dead as the Living.

If Freight be contracted for the transporting of Women, and they happen in the Voyage to be delivered or Children on Ship-board, no Freight becomes due for the Infants.

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The Charter-party does settle the Agreement, and the Bills of Lading the Contents of the Cargo, and binds the Master to deliver them well Conditioned at the Place of Discharge, according to the Contents of the Charter-party or Agreement; and for Performance, the Master obliges Himself, Ship, Tackle and Furniture to see the same done and performed.

If Goods are sent aboard, generally the Freight must be according to Freight for the like accustomed Voyages.

If a Ship shall be Freightied and named to be of such a Burden, and being Freightied by the Tun, shall be found less, there shall no more be paid than only by the Tun for all such Goods as were laded aboard.

If a Ship be Freightied for two hundred Tuns or thereabouts, the addition of *thereabouts* is commonly reduced to be within five Tun, more or less, as the Moiety of the number *Ten*, whereof the whole number is compounded.

If a Ship be Freightied by the great, and the Burden of not exprest, yet the Sum certain is to be paid.

IX. If the Ship, by reason of any Fault arising from the Freightier, as lading aboard prohibited or unlawful Commodities, occasions a Detention, or otherwise impedes the Ship's Voyage, he shall answer the Freight contracted and agreed for.

If a Ship be Freightied *out* and *in*, there arises due for Freight, nothing, till the whole Voyage be performed: so that if the Ship die, or is cast away coming home, the Freight outwards, as well as inwards becomes lost.

13th July, 1680, in Chancery, a Part-Owner of a Ship sued the other Owners, for his Share of the Freight of the Ship which finished her Voyage; but the other Owners set her out, and the Complainant would not join with them in setting her out, or in the Charge thereof; whereupon the other Owners complained in the Admiralty; and by Order there, the other Owners gave Security, That if the Ship perished in the Voyage, to make good to the Plaintiff his Share, or to that effect; in such a Case, by the Law Marine, and Course of the Admiralty, the Plaintiff was to have no Share of the Freight. It was referred to Sir *Lyonel Jenkins* to

R

certify

There are 3 Bills of lading always made, the one to be sent over Sea to him whom the Goods are consigned to, the other for the Master, and the last for the Merchant or Lader.

Chase & Jones
vers. Lovering.
Styles 220.
Leg. penult. § 9. F. de locat.

Trin. 9. Fac.
B. R. Bright.
versus Compers
Brownlow,
1 part. 21.
Leg. Oleron.
Leg. Naval.
Rhod. Art. 29.

certify the Course of the Admiralty, who certified accordingly, and that it was so in all places, for otherwise there would be no Navigation, whereupon the Plaintiff's Bill was dismissed. See more of Freight, and the Incidents thereunto, *lex Mercatorum* 100.

X. If a Master freights out his Ship, and afterwards secretly takes in other Goods unknown to the first Loaders, by the Law *Marine* he loses his Freight; and if it should so fall out, that any of the Freighter's Goods should for Safety of the Ship be cast over-board, the rest shall not become subject to the Averidge, but the Master must make good that out of his own Purse: But if the Goods are brought into the Ship secretly against his Knowledge, it is otherwise; and Goods so brought in, the same may be subjected to what Freight the Master thinks fitting.

Consol. del Mer.

Leg. Olcron.

If the Ship puts into any other Port than what she was freighted to, the Master shall answer Damage to the Merchant; but if forced in by Storm, or by Enemy, or Pirates, he then must sail to the Port conditioned at his own Costs.

Rule.

Generally the touching at several Ports by Agreement, imports not a Diversity, but a Voyage entire.

Leg. Consolat. del Mare.

XI. If Passengers having Goods, happen to die on Ship-board, the Master is to Inventory their Concerns, and the same may a Year keep; and if none claim the same, the Master becomes Proprietor defeasable: But the Bedding and Furniture of the Parties become the Master's and his Mates, and the Clothing are to be brought to the Ship's Mast-head, and there praised and distributed amongst the Crew, as a reward for their Care of seeing the Body put into the Sea.

Bald. in leg. certi juris in 4. Q. in verb. Quid ergo Cod. locat.

XII. The Lading of the Ship in Construction of Law, is tacitly obliged for the Freight, the same being, in Point of Payment, preferred before any other Debts to which the Goods so laden are liable, though such Debts, as to time, were precedent to the Freight; for the Goods remain as it were bailed for the same: Nor can they be attached in the Master's Hands (though vulgarly it is conceived otherwise.)

Ships deserve Wages like unto a Labourer; and therefore in the Eye of the Law, the Actions touching the same,

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same, are generally construed favourably for the Ship and her Owners: And therefore if four Part-Owners of five, shall make up their Accounts with the Freighters, and receive their Proportions, yet the fifth Man may sue singly by himself without joyning with the rest; and this as well by the Common Law as the Law Maritime.

Hill. 26. 27.
Car. 2. in B. R.
Stanley versus
Ayles by
Hales, Keble
3 Rep. 444

XIII. A Ship in her Voyage happens to be taken by an Enemy, afterwards in Battel is re-taken by another Ship in Amity, and Restitution is made, and she proceeds on in her Voyage, the Contract is not determined, though the taking by the Enemy divested the Property out of the Owners; yet by the Law of War that Possession was de-seizable, and being recovered in Battel afterwards, the Owners became re-invested: So the Contract by Fiction of Law, became as if she never had been taken, and so the entire Freight becomes due.

7 R. 2. Scatham
Abridg. 54.
In Jure Possi-
mini leg. retor.
& leg. in bello
S. 1.

Covenant by a Charter Party, that the Ship shall re-turn within the River of Thames by a certain time (*periculis & casualitatibus Marium, Anglice, Dangers of the Sea, exceptis*) and after in the Voyage, and within the time of the return, the Ship was taken upon the Sea, *per homines bellicosos modo guerrino arraiatos*, to the Cove-nantor unknown, &c. & *abinde huc usq; detenta fuit* by them, *per quod* he could not return within the River of Thames within the time mentioned in the Covenant. Resolved this Impediment was within the Exception, for these Words intend as well any Danger upon the Sea by Pirates and Men of War, as Dangers of the Sea by Shipwrack, Tempest, or the like. *Pickering and Bark-ley, Stiles 132. & 2 Roll's Abr. 248.*

XIV. If Freight be taken for 100 Tuns of Wine, and twenty of them leak out, so that there is not above eight Inches from the Buge upwards, yet the Freight be-comes due: One Reason is, because from that Gage the King becomes Entitled to Custom; but if they be under 8 Inches, by some it is conceived to be then in the Ele-ction of the Freighters to sling them up to the Master for Freight, and the Merchant is discharged. But most con-ceive otherwise; for if all had leak'd out, (if there was no Fault in the Master) there is no Reason the Ship should lose her Freight; for the Freight arises from the

Boyer vers.
Cole sen. &
Cole jun. Hill.
26, 27 Car. 2.
in B. R.

R 2

Tunnage

Tunnage taken, and if the Leakage was occasioned through Storm, the same perhaps may come into an Averidge. Besides, in *Bordeaux* the Master stows not the Goods, but the particular Officers appointed for that Purpose, *quod nota*. Perhaps a special Convention may alter the Case.

Most certain, if a Ship freighted by the Great, be cast away, the Freight vanishes; but if by the Tun or Pieces of Commodity, and she happens to be cast away, afterwards Part is saved; doubted whether *pro rata* she ought not to be answered her Freight.

When such a Misfortune happens, the Ensured commodity transferred those Goods over to the Assurers, who take them towards Satisfaction of what they pay by Virtue of their Subscriptions.

Debt upon a Charter Party upon a Penalty, the Covenant was to pay so much *per Tun* for Freight, and Breach was assigned in *non* Payment, for so many Tun and an Hogshead, which came to so much: Upon Demurrer 'twas held the Declaration was Ill, for the Covenant is only to pay so much *per Tun*; *aliter* if it had been to pay *secundum ratam* of so much *per Tun*. *Res* against *Barns*, 2 *Levinz*. 124. 3 *Keeble* 421.

Relu. 134.

XV. If a Merchant takes Freight by contracting with a Mariner that is not a Master, if Loss happens, he must be contented to sit down without any Remedy against the Owners; but perhaps such a Mariner for such an Act may subject himself to an Action.

Coke 4 Instit.
fol. 146.

But if there be a Fault committed by a Mariner which was hired, or put in by the Master or Owners; there for Reparation the Owners become liable.

Johannes Locum, l. 3. c. 8.

XVI. The Master is not bound to answer Freight to the Owners for Passengers, if they are found to be unable to pay.

If Ship by *Charter-party* reciting to be of the burden of 200 Tuns is taken to Freight for a Sum certain, to be paid at her return, the sum certain is to be paid, though the Ship amounts not to that Burden.

If a Ship is freighted after the rate of 20*l.* for every Month that she shall be out, to be paid after arrival at the Port of *London*; the Ship is cast away coming up from the *Downs* but the Lading is all preserved; yet the Freight is

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is become due: For the Money arises due monthly by the Contract, and the Place mentioned is only to shew where payment is to be made, for the Ship deserves wages like a Mariner, who serveth by the Month; and though he dies in the Voyage, yet his Executors are to be answered *pro rata*. Besides, the Freight becomes due by intendment on the delivery or bringing up of the Commodities to the Port of London, and not of the Ship.

If a Man freights a Ship out, and covenants that the Ship with the first Wind and Opportunity should sail out of that Port to *Cales*, and the Freighter covenants that he for the Freight of all the Premises would pay unto the Master 184*l.* *pro tota transfretatione omnium premissarum*, if the Master doth not aver that the Ship did arrive at the Port of *Cales*, he cannot maintain an Action against the Freighter. If the Master enters into a Charter-Party for himself and Owners, the Master in that case may release the Freighters without advising with the Owners; but if the Owners let out to Freight such a Ship whereof J. S. is Master, though the Master Covenant in the same Charter-party and Subscribes, yet his Release in that case will not bind the Owners, but the Owners release on the other hand will conclude the Master: And the reason is, for that the Master is not made a proper Party to the Indenture. And so it was ruled, where an Indenture of Charter-party was made between *Scudamore* and other Owners of the good Ship called the *B.* whereof *Robert Pitman* was Master on the one Party, and *Vandensene* on the other Party; in which Indenture the Plaintiff did covenant with the said *Vandensene* and *Robert Pitman*, and bound themselves to the Plaintiff and *Robert Pitman* for performance of Covenants in 600*l.* and the Conclusion of the Indenture was, ——— *In witness whereof* the said *Robert Pitman* put his Hand and Seal, and delivered the same; in an Action of Covenant for not performing certain Covenants in this Indenture, the Defendant pleaded the Release of *Pitman*; whereupon the Plaintiff demurred: And it was adjudged, That the Release of *Pitman* did not bar the Plaintiff, because he was no party to the Indenture; and the diversity in that case was taken and agreed between an Indenture reciprocal between Parties on the one side, and Parties on the other side, as that was; for there no

1 Bulstr. 167.
1 Inst. 204. a.
Dy. 76. a.
Hob. 41.
2 Sand. 350.

3. Cro. 56.
Scudamore & al' versus Pitman. Trin. 29.
Eliz. in B. R.
cited in *Coke*
2 Inst. fol. 673. Agree.
2 Lewinz. 74.
Cook & Child & 3 Lewinz.
138. *Gilby versus Copley.*
que semb. contra.

Bond, Covenant or Grant can be made to or with any that is not party to the Deed; but where the Deed indentured is not reciprocal, but is without a *Between, &c.* as *Omnibus Christi fidelibus, &c.* there a Bond, Covenant or Grant may be made to divers several Persons.

If an Indenture of *Charter-party* be made between *A.* and *B.* Owners of a Ship of the one Part, and *C.* and *D.* Merchants of the other Part, and *A.* only Seals the Deed of the one Part, and *C.* and *D.* of the other Part; but in the Indenture it is mentioned that *A.* and *B.* Covenant with *C.* and *D.* and *C.* and *D.* Covenant with *A.* *B.* in this Case *A.* and *B.* may join in an Action against *C.* and *D.* tho' that *B.* never Sealed the Deed, for he is a Party to the Deed, and *C.* and *D.* have Sealed the other Part to *B.* as well as to *A.* *Clement* against *Henley*, 2 *Rolls Abr.* 22.

Covenants mutual shall not be pleaded one against the other.

XVII. Covenant upon a *Charter-party*, by which the Master of the Ship covenants to Sail with the first fair Wind to *Barcelona*, and that the Mariners shall attend with a Boat to relade the Ship, and then to return with the first fair Wind to *London*, and to unlade and deliver the Goods, and the Merchants covenant to pay so much for Freight, and so much for Demorage every day; the Master brought his Action for the Freight and Demorage, and declares that he sailed such a Day with the first fair Wind, and upon all the other Points. The Defendant *quoad* the Freight that the Ship did not return directly to *London*, but went to *Alicant* and *Tangier* and made divers Deviations, and by these delays the Goods were spoiled, and as to the Demorage, that this was occasioned by the Negligence of the Mariners in not attending with the Boat to relade the Ship; to which the Plaintiff demurred, and *per Curiam pro Quer.* for that the Covenants are mutual and reciprocal, upon which each shall have his Action against the other, but shall not plead the breach of one in bar of another, for perhaps the damage of the one side and of the other are not equal. 3 *Levinz.* 41. *Cole contra Shallet.* Sir *Tho. Jones* 216. *Showers* against *Cudmore.*

Plea that answers to Part only is Ill.

In Covenant the Plaintiff declared, that he Covenanted to sail with a Ship to *D.* in *Ireland*, and there to take 280 Men of the Defendants, and to carry them to *Jamaica*.

ca, and the Defendant Covenanted to have the 280 Men there ready, and to pay for their carriage 5*l.* for each Man, and that the Defendant had not the 280 Men ready, but that he had 180, which he took on Board, and carried them, but that the Defendant had not paid for them, the Defendant pleaded that he had the 280 Men ready, and rendered to the Plaintiff, who refused to receive 'em, but said nothing as to the carrying of the 180 Men, nor to the Payment for them; and for that it was not a Plea to all, Judgment was given for the Plaintiff upon Demurrer, 1 *Levinz*, 16. *Thomson versus Noell*, & 1 *Keeble* 100.

Cro. El. 268.
Pl. 3.330 *pl.* 10.
 433, 434.
Cro. Jac. 27.
1 Sand. 27, 28.
2 Sand. 127.
Lutw. 1492.

CHAP. V.

Of Wreck.

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| <p>I. Of Goods wreckt, as in relation to the Alteration of the Property by the Civil Law.</p> <p>II. Of the Preservation of Goods wreckt, and the Punishment of those that shall add Misery to the Condition of such Persons so distressed.</p> <p>III. Of Goods wreckt, their Preservation according to the Laws of Oleron, and of England, and of the Punishment of those that shall not make Restitution.</p> <p>IV. Of Contribution where the Ship perishes, and the Goods are all saved, and where not.</p> <p>V. The King of Great Britain's Prerogative as in relation to Wreck and other Royalties of the Sea.</p> | <p>VI. Of Floesam, Jetsam and Lagan, where the King shall have the same, and whether by the Grant of Wreck the same passes; and where a Subject may prescribe.</p> <p>VII. Of Ships wreckt and no Creature in them, yet no Wreck; and of Ships forsaken, whether in Law accounted lost or wrack, or neither.</p> <p>VIII. Of the Sheriff's Duty as in relation to Goods wreckt; and of Owners their time of claiming their Property.</p> <p>IX. Wreckt Goods not to pay Custom.</p> <p>X. Of Wreck, in the Isle of Wight, not in the Admiral without special Words.</p> |
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I. IN matters of *Wreck* there is, as it were, a Contract between them which have lost their Goods by such Misfortune, and them upon whose Lands the Goods and Merchandize

*Leg. ne quid ff.
de incendiis,
ruina & nau-
fragio.*

*Leg. 44. D. de
acq. rer. dom.*

chandize are driven, that the same be restored to them or those that claim under them. And therefore by the *Civil Law*, it is precisely forbid, that no Man shall meddle with such Goods as are Wreckt; and such as are proved to have stoln any thing thereout, are holden for Robbers; for that such Goods being cast on Land and recovered out of the Sea, remain still his who was the Owner thereof, and descend upon his Successor; neither Escheat to the King, neither to any other to whom the King hath granted such Royal Privilege.

The reason why the Laws were so strictly declared by the *Romans*, was, for that by the Laws of *Rhodes*, if any Ship had become Wreck, though all the Persons were saved and alive, yet the Ship and Goods became seisible by the Lord: But the same being barbarous, was afterwards repealed and abrogated.

*Leg. 1. lib. 11.
C. de Naufrag.*

The Emperor *Constantine* the Great, says in this Case, if any Ship at any time by any Shipwrack be driven to the shore, or touch at any Land, *Let the Owner have it, and let not my Exchequer meddle with it: For what right hath my Exchequer in another man's Calamity, so that it should hunt after Gain in such a woful Case as this is?*

And yet if no Kindred appear within a Year and a Day, or appearing, prove not the Goods shipwrack'd to be theirs, the Goods come to the *Exchequer*, even by that Law: So much that Law condemns carelesness, which is written, *vigilantibus & non dormientibus, &c.* And with this agree the Laws of *Oleron* and the Laws of this Land, as taken out of those Imperial Laws, in that Point, as is conceived.

*Leg. 1. in pr. de
incend. ruin.
leg. in eum cum
auth. seq. de
furt. Leg. 3. in
fir. de incend.
ruin. naufrag.*

*Leg. pedibus
cod.*

II. The *Civil Law* was ever so Curious and Careful to preserve the Goods of such miserable Persons, that if any should steal such, they should pay four-fold to the Owner, if pursued within a Year and a Day, and as much to the Prince or his Admiral: So careful were they, and so exact in requiring Restitution, that the very stealing of a Nail, or the Worth thereof, obliged the Thief to the Restitution of all the remaining Goods. And by the Emperor *Ansonius* it was made a Law for such sort of Men, that they should be batten'd and banish'd for three Years; but that was only for those of a high and honourable Rank: But those

those that were Base and Ignoble, should be scourged and sent to the Gallies or Metal Mines.

And the preventing of Help to such shipwreckt Persons, was punish'd with the same Suffering as a Murderer.

Arg. leg. singularis de Extr. crim.

The like for those that shall put forth any treacherous Lanthorn or Light, with Intention to subject them to Danger or Shipwrack, was punished with Death.

And though no Harm happens, yet he may be punished: Hence it is, that Fishers are forbidden to fish with Lights in the Night, for fear of betraying Sailers.

Per leg. incend. ruin. naufrag. Leg. ne piscator. And here I

cannot omit the great and pious Care that His Majesty hath had, in his Directions about Light-Houses and Lanthorns, and other special Sea-marks; but more especially in his erecting at his own Princely Charge, that most Excellent Light-House near Goldston by Yarmouth, which, both for Height, Curiosity and Form, is not Inferior to, if not Excelling, all, or most, in Christendom.

III. And as the Emperor and other maritime Kingdoms, had in some sort abrogated and repealed that cruel Law, and subjected the Violators to Punishment for the Inhumanity offered to such distressed Persons; so our Famous King Richard, returning from the Holy War, in his own Experience at Sea, became sensible of the Miseries which Merchants and Mariners at Sea underwent, their Lives being always within few Inches, often within an Hair's Breadth of Death; and having Consideration of their Calamities and Distressed State in his Voyage, resolved to revoke that Law, and at Oleron in the Bay of Aquitaine (then part of his Dominions, as Sovereign Lord of the Ocean, and all those Maritime Kingdoms, did there, amongst other good Marine Laws, declare; That if any Person or living Thing escaped out of any wrecked Ship or Land, it should not be Wreck or Confiscated to him or his Successor, as it was before, though all the Men escaped alive. For before that, both in England and in Normandy, the Crown was Entitled to shipwrackt Goods, and the King *Jure Gentium* (indeed according to the Rhodian Law) became Heir unto them, which other *Jure naturali* were conceived to be in bonis nullius, pertaining to no Owner: But now that Valiant and Religious Prince resolved no longer to embrace so cruel Prerogative, by the stripping the distressed Mariners of

** Bracton, lib. 2. cap. 5. † Customa Norman. c. 17.*

Roger Hoveden
in the latter
part of his
Annals, fol.
678. Joan
Brompton.
Chron. Coll.
fol. 1887.

Westm. i. c. 4.
3 E. 1.

2 Inst. 166.

Per Leg. Cle-
ron, cap. 47.

Leg. 37. Na-
val. Rhod. C.
40.

of those Rags of their Estates, which the Mercy and Mode-
sty of the Waves and Winds had left them ; and therefore
in the Month of October at Missana, in the presence of many
Archbishops, and Bishops, and others, he then for ever
quitted the Royal Claim to Wrecks, which afterwards
was declared and published at Oleron in his own Territo-
ries ; so that if any Man out of the Ship came alive to
shore, the Property of the shipwrackt Goods was still
preserved to the Owner : Which Royal Condescencion
was so enlarged by our succeeding Kings, That if a Dog,
or Cat escapes alive out of the Ship, neither the Ship
or other Vessel, nor any thing therein shall be adjudged
Wreck, but the Goods shall be saved and kept by the Sher-
riff, Coroners, or the King's Bailiffs, and delivered to the
Inhabitants of the Town where the Goods are found ; so that
if any within a Year and a Day, sue for those Goods, and af-
ter prove that they were his at the time of the Shipwrack
they shall be restored to him without delay : But if not
they shall be seized by the said Sheriff, Coroners or Bail-
iffs for the King's use ; and shall be delivered to the In-
habitants of the Town, who shall answer before the Ju-
stices for the Wreck belonging to the King : But this
good Law extends not to Pirates, Robbers, Sea Robbers,
Turks, or other Enemies to the Catholick Faith.

Where the Wreck belongs to another, he shall have it
in like manner ; and if any be attainted to have done
otherwise, he shall suffer Imprisonment, make Fine to the
King, and yield Damage also.

If a Bailiff do it, and it be disallowed by his Lord, the
Bailiff shall answer for it if he hath wherewithal ; but
if not, the Lord shall deliver his Bailiff's Body to the
King.

IV. If the Ship perishes only, and the Goods are saved
in that Case the Goods ought to pay a Proportion of
fifth or tenth Penny, according to the easie or difficult
Winning or Saving of the said Goods. Rich Goods,
Gold, and Silver, and Silk, pay less than Goods of great
Weight and Cumber, being in less Danger, unless it were
a Wreck going into a Port, which the Skipper was not
bound for, there *è contra*, then the Skipper is not to be
considered,

But if the Ship and Goods perish in the Sea, and the Owners do totally forsake her, and so she becomes a meer *Derelict*, in that Case the first Possessor that recovers her, or any part of her Lading, gains a *Property*: And this according to the Laws of Nations, as is that given for lost, whereof there is no Hopes of Recovery, like a Lamb in the Paws of a Lion. And the incomparable *Ulpian* compares such a *Dereliction* to a Man that knows his own Goods to be by another Man detained, and makes no claim unto them in a long time; unless some Cause do manifestly appear, seems to do it to no other Purpose but to shew that he is willing to renounce them; and this is it that *Ulpian* elsewhere intends, where he saith, that a House possess'd for a long time by another, and no claim made, nor Rent demanded for it, seems to be deserted by the right Owner.

To exact Interest long since due, saith the good Emperor *Antonius*, is hardly just; for the not demanding it in so long a space, makes it probable that thou wert willing to remit it; and that by not so much as demanding it, thy purpose was to make thy self the more Beloved and Honour'd, and thy Debtor the more Thankful.

Now that Silence should be of such a force as to justify our Presumption of a *Dereliction*, two things are requisite; First, That he that is silent knows that he hath a Right; for him that knows it not, Silence cannot prejudice. Secondly, That his Silence be free and voluntary, and not occasioned by Fear, or any other such Cause; and the true reason is, that it is hardly possible that in a long time a Man should not by some Means or other arrive at the Knowledge of his own Right, time daily administering occasions to the discovery of Truth.

But because that time, which exceeds the Memory of Man, is in a moral Sense infinite, therefore if Claim be not made within a reasonable time to a thing out of Possession, it is a sufficient Presumption that it is forsaken, unless some very strong Reasons be brought to the contrary; and therefore the recovery of the Plate near the *Babama* Rocks, lost near fifty Years since by the Spaniard, became most apparently a *Derelict*, and free not only for the Undertakers to recover and possess, but to keep as

*Grotius lib. 2.
cap. 4. §. 5, 6.*

Duke of *Albemarle & al.* as a Property justly acquired by them, as well by the Laws of Nations, as the *Civil Law*.

in Anno 1687.
17 E. 2. c. 11.

V. The King shall have Wreck of the Sea, Whales, and great Sturgeons taken in the Sea, and elsewhere throughout the whole Realm, except in Places privileged by the King.

Sir Henry Con-
stable's Case,
Coke 5 part.
fol. 107.

VI. By the Grant of Wreck will pass *Flotsam*, *Fetsam*, and *Lagan*, when they are cast upon the Land; but they are not cast upon the Land, the Admiral hath Jurisdiction, and not the *Common Law*, and they cannot be said Wreck.

5 Co. 106. a
5 Co. 106. b.

Wreccum Maris, are such Goods only as are cast and left upon the Land by the Sea.

Flotsam, is when a Ship is sunk, or otherwise perished, and the Goods float upon the Sea.

ibid.

Fetsam, is when the Ship is in danger to be sunk, and for lightning the Ship, the Goods are cast into the Sea notwithstanding which the Ship perisheth.

ibid.

Lagan vel Ligan, is when the Goods being heavy, are cast into the Sea before the Ship perishes, which by the Prudence of the Master or Mariners, who have an intent to save them so sunk, as that they may come at them again; in order to which they fasten a Buoy or other light Matter, that may signify to them where they lie, if Providence should bring them in a Condition to recover them.

46 E. 3. 15.
Anth. Omnes
perigrini com-
munia de suc-
cessionibus acq.
per Leg. Oleron.

The King shall have *Flotsam*, *Fetsam* and *Lagan*, when the Ship perisheth, or when the Owners of the Goods are not known; but when the Ship perishes not, it cannot be said Wreck.

Coke 5. part.
fol. 107.

Coke 2 Instit.
fol. 167.

Leg. 8. D. de
leg. Rhod. de

A Man may have *Flotsam* and *Fetsam* by the King's Grant; and may have *Flotsam* within the high and low Water-mark by Prescription, as it appears by those of the West-Countries, who prescribe to have Wreck of the Sea; so far as they may see a *Humber Barrel*.

VII. If the Ship be ready to perish, and all the Men therein, for Safeguard of their Lives, leave the Ship, and after the forsaken Ship perishes, if any of the Men be saved and come to Land, the Goods are not lost.

A Ship on the Sea was pursued by Enemies, the Men therein for Safeguard of their Lives, forsake the Ship, the Enemies take the Ship, and spoils her of her Goods.

and Tackle, and turn her to Sea; by stress of Weather 5 R. 2. pro
 is cast on Land, where it happened her Men arrived: Willielmo Fish-
 was resolved by all the Judges of England, that the lake Co. 2 Inst.
 ship was no Wreck, nor lost. f. 167. Leg.

VIII. If Goods are cast up as a Wreck, and it falls out 43. S. 11. D.
 they be bona peritura, the Sheriff may sell them within de furt.
 the Year, and the Sale is good; but he must account to Pl. Com. 466.
 the true Owners.

Owners claiming the Wreck, must make their Proof by F. N. B. fol.
 their Marks or Cocquets, by the Book of Customs, or by 112. c. The
 the Testimony of honest Men; and if the Wreck belongs Year and Day
 to the King, the Party may sue out a Commission to hear shall be ac-
 and determine, and that by the Oaths of twelve Men; or counted from
 if he may bring his Action at Law, and make out his the Seifure,
 proof by Verdict; but such Action must be brought 2 Inst. 168.
 within the Year and Day. 5 Co. 107. b.

Note, Flotsam, Jetsam and Lagan, are Goods on or in 5 Co. 126. b.
 the Sea, and belong to the King, who by Charter hath
 granted them to the Lord Admiral.

IX. If Goods were wreckt on the Shore, and the Lord Left unresol-
 having Power, takes them, he shall not pay Custom, nei- ved in Moor
 ther. fol. 224. But

ed in C. B. upon a special Verdict found at St. Edmund's Bury in Suffolk. since adjudg-

by the Common Law nor by the Statute; for at the Shep. versus
 Common Law, wrecked Goods could not be charged with Gosnold, HiB.
 Custom, because at the Common Law all Wreck was whol- 23, 24 Car. 2.
 to the Kings, and he could not have a small Duty of Cu- Ror. 615.
 stom out of that which was all his own; and by Westm. Vaughan, fol.
 where wrecked Goods belonged more to another than 159.
 the King, he shall have it in like manner, that is, as
 the King hath his.

Now Goods that are chargeable with Custom, accord-
 ing to the Act of Tunnage and Poundage, must have these
 properties.

1. They must be Goods which shall come or be brought 12 Car. 2. c. 4.
 to the Ports or Places of the Kingdom.

2. They must come or be brought into such Ports or
 Places, as Merchandize that is for sale, and to that end;
 there can be no other Conception of Goods brought
 Merchandize.

3. They

3. They must come and be brought as *Merchandize* and for sale by the King's natural born Subjects, or by Strangers and Aliens, as distinguish'd from the natural Subjects.

4. The Duty payable to the King, is to be measured by the Quality of him that imports the Commodity; that is, if the Importer be a natural Subject, he pays less to the King; and if an Alien, more.

5. All those Goods charged with the Duty by the Statute, so to come, or be brought into Ports or Places of the Kingdom, are to be foreign, as of the Growth of France, the Levant, Spain, Portugal, Germany, &c.

Whence it follows, 1. That Goods of foreign Growth, and which by their kind, are to pay Duty, if they shall come or be brought into the Ports or Places of the Kingdom, neither by the King's natural born Subjects, nor by Aliens, they are not chargeable with the Duties mentioned in the Act.

2. If they are not brought into the Ports and Places of the Kingdom as *Merchandize*, viz. for Sale, they are not chargeable with the Duty; but Wines or other Goods coming or brought into the Realm as *Wreck*, are neither brought into the Kingdom by any of the King's Natural born Subjects, nor by any Strangers, but by the Wind and Sea; for such Goods want a Proprietor until the Law appoints one.

3. *Wrecked Goods* are not brought into the Kingdom being cast on Shore, as *Merchandize*, viz. for Sale, but are as all other the native Goods of the Kingdom, indifferent in themselves, for Sale or other use at the Pleasure of the Proprietor.

4. All Goods foreign or domestick, are, in their Nature capable to be *Merchandize*, that is, to be sold; but it follows not thence, that wheresoever they are brought into the Kingdom, they are brought as *Merchandize* and to be sold, and should pay Custom; for they are transferred from Place to Place, more for other uses than for Sale.

5. All Goods charged with the Duty of the Act, must be appropriated by a Merchant Natural born, or Merchant Alien, and the greater or less Duty is to be paid, as the Proprietor is an Alien or Native Merchant; but wrecked Goods

Goods are not the Goods of any Merchant natural born, Alien or Denizen, whereby the Duty payable should be either demanded, distinguish'd, or paid: Therefore a Duty impossible to be known, can be no Duty; for Civilly *what cannot be known to be, is as that which is not.*

6. All Goods subject to the Duty of Tunnage and Pannage, may be forfeited by the Disobedience and Misbehaviour of the Merchant-Proprietor, or those trusted by him, As *unshipping before Payment, or lawfully tending or agreeing for, &c.* But wrecked Goods cannot be imported into any Creek or Place of the Realm by way of Merchandize, and unshipped to be laid on Land; for if so imported and unshipped to be laid on Land, it is no Wreck, and therefore are not Goods forfeitable by the Misbehaviour of any within the Act; and consequently not Goods intended to be charged with the Duties by the Act.

Goods drowned or lost in passing a Ferry, a great River, or an Arm of the Sea are not to be said to be exported, though they be carried to Sea; but Goods exported are such as are conveyed to Sea in Ships or other Naval Carriages of Man's Artifice; and by like Reason, Goods imported must not be Goods imported by the Wind, Water, or such inanimate Means, but in Ships, Vessels, and other Conveyances used by reasonable Agents, as Merchants, Mariners, Sailors, &c. Whence it may be concluded, that Goods or Merchandize imported within the Meaning of the Act, can only be such as are imported with Deliberation, and by reasonable Agents, not casually and without Reason; and therefore wrecked Goods are no Goods imported within the Intention of the Act, and consequently not to answer the King's Duties; for Goods, as Goods, cannot Offend, Forfeit, Unlade, pay Duties, or the like, but Men whose Goods they are: And wrecked Goods have no Owners to do those Offices, when the Act requires they should be done; therefore the Act intended not to charge the Duty upon such Goods.

The Admirals of England, *ut magnus Admirallus Angliæ, Hiberniæ, Walliæ, ac Dominiorum & Insularum earundem, Villæ Calisiæ & Merchiarum ejusdem, necnon Gasconiæ, Aquitania, classium & Marium dictorum Regnorum Angliæ præfectus*

The very Words of the Lord Howard's Patent, in 28 Eliz. in Rot. Admir. m. 10.

señus generalis, &c. which are the words of their Patent used at this day, do claim all Wrecks arising from any of those places, by virtue of their Grants.

And yet in the like Case, in all Circumstances between Power and Sir. William Portman, Hill. 6. William Com. B. Rot. 1431. where the Judges, and more particularly Chief Justice Treby, seemed to be of Opinion, that Goods wrecked or Flotsam, should pay Custom.

X. King Edward the Second, in the first Year of his Reign, by his Charter, granted the Castle of Carisbrook, with all the Lands and Tenements in the Isle of Wight formerly belonging to Isabella Fortibus, Countess of Albermarle, to his great Favourite Peter de Gaveston, and Margaret his Wife, and the Heirs of their two Bodies begotten (together with sundry other Castles and Lands) and commanded Nicholas de Bosco to put him into actual Possession; and likewise commanded Robert de Sanson, Keeper of the Forest of Parkhurst in that Isle, to be intendent to them for the Farm he had granted him for Life, for the Custody thereof, which being afterwards soon re seized into the King's Hands, he granted the Castle with all its Services, and all his Lands in that Isle, to Edward his Son and his Heirs Kings of England, and afterwards, for the ascertaining what did of Right belong to the same Castle, an Inquisition went out by which it was found, *inter alia* qd' *wreckum Maris pertinens ad dictum Castellum valet per Ann. 4 s.*

So that, by the general Patent of the Admiral, will not pass the Wreck of this Isle, without special Words granted in the Patent.

Note, If the Wreck happened, or was occasioned by reason of any Fault or Negligence in the Master or Mariners, the Master must make good the Loss; but if the same was occasioned by the Act of God, to avoid an Enemy or Pirate, and the like, there he shall be excused.

Leg. 3. §. 1. D.
Naut. coup St.
lib. 1. §. 4. D.
de obl. & act.
leg. 26. §. 6. D.
mand. Quia

*vis major pro-
videntiam & industriam humanam superat, nisi culpa casum præcesserit.*

C H A P. VI.

Of Averidges and Contributions.

Of Goods and Merchandize, when
subject to be cast over-board.

I. Of the Account rendred of such
ejected Goods, and by whom.

II. Of the ancient Laws of Eng-
land, in reference to such Eject-
ments.

V. What Goods must come into the
Averidge, and what are exempt.
The Description of Averidge.

V. The Master discharged by such
Acts, by the Common Law.

I. The Ship's Gear or Apparel,
whether within the Averidge.

II. The residue of the Goods where
tacitly obliged to answer the Ave-
ridge.

III. Of Goods remaining on ship-
board, spoiled by reason of the eject-
ing of others, where subject to the
Averidge.

X. Where Ship and Lading are both
made liable to the Averidge.

X. Of Misfortunes not subject to an
Averidge.

XI. Where the remainder of the Goods
are exempted from the Averidge,
and the Damage of the ejected
Goods falls on the Master.

XII. Damage to the Ship, where the
Lading contributes, and the stan-
dard Rate in Contributions.

XIII. The Master becomes a Captive
for the Redemption of Ship and
Lading, where liable to the Ave-
ridge, and where discharged.

XIV. What Goods are subject to the
Averidge.

XV. Contribution for Pilotage, and
where the remaining Goods not
subject to Averidge.

XVI. Rules general for setting the
Averidge.

XVII. Three Sorts of Goods taken
at Sea.

SHIPS being freighted and at Sea, are often sub-
ject to Storms and other Accidents, in which, by jact.
the ancient Laws and Customs of the Sea, in extreme Ne-
cessity, the Goods, Wares, Guns, or whatsoever else shall be
thought fit, may in such Extremity be flung over-board; fol. 41. b. n. 3.
but then the Master ought to consult with his Mariners,
who if they consent not, and yet the Storm and Dan-
ger continues, the Master may command notwithstanding
the casting over-board what he shall judge most
fitting for the common Safety of the rest. So likewise
Goods coming from infected Towns or Places may be
cast over-board; and if an Action be brought at Com-

49 E. 3. fol. 15. *mon Law*, the Defendant may justify the same by pleading the Special Matter.

Leg. Oleron,
cap. 8.

If there be a *super Cargo*, a Request ought to be made to him to begin first; but if he refuses, the Mariners may proceed.

Leg. Consolat.
del Mere.

II. If the Ship so fortunes as to out-weather the Storm, and in Safety arrives at her Port of Discharge, the Master, and most of the Crew, must swear that the Goods were cast over for no other Cause but purely for the Safety of the Ship and Lading. The Custom of clearing of that Point, varies according to the several Countries or Places they arrive at.

Leg. Wisbicens.
Artic. 38, 39.

Where Goods are laden above the Overlope, or forbidden Goods be transported; if such Goods happen to be the Cause of any Danger or Damage, the Master shall bear the Loss; also he may be prosecuted Criminally.

Leges Guliel. 1.
& H. 1. c. 98.
de pactis ad legem Rhodiam.

III. King William the Conquerour, and Henry the First, made and ratified this Law concerning Goods cast over-board by Mariners in a Storm, in Imitation of the Ancient Rhodian Law, *De jact.*

Selden ad
Eadmerum &
Notæ & Spicilegium,
fol. 183.
Weelock de
Pris. Anglorum
legibus fol. 167.

Si ergo fecero res tuas de navi ob metum mortis, de hoc non potes me implacitare, nam licet alteri damnum inferre ob metum mortis quando periculum evadere non potest. Et si de hoc me melleces, quod ob metum mortis non fecisse de comelproari. Et ea que in navi resstant videntur in communi secundum catalla, & si quis jecerit catalla extra navim quando necessitas non exegerit, ea restituat.

Leg. 1. & 2.
ad leg. Rhod.
& leg. Oleron.

IV. The Ship arriving in safety, the remainder must come into the *Averidge*, not only those Goods which pay Freight, but all those that have obtained Safety and Preservation by such *Ejection*, even Money, Jewels and Clothes, and such like, are not exempted.

But those things which are born upon a Man's Body, Victuals, and the like, put on Ship-board to be spent, are totally excluded from the Contribution.

Leg. Wisbicens.
Artic. 20, 21.

The Master ought to be careful, that only those things of the least Value and greatest Weight be flung over-board.

In the rating of Goods by way of Contribution, this Order is observed. If they chance to be cast before half the Voyage be performed, then they are to be esteemed at the Price they cost; if after, then at the Price as the rest, or the like shall be sold at the Place of Discharge.

The Person (whose Goods have been cast) is to be careful to have the same estimated before the Ship do discharge, wherein the Master ought to be Assistant.

Averidge, in the Merchant's Law, is used or taken for a certain Contribution that Merchants and others do proportionably make towards their Losses who have their Goods cast into the Sea for the Safeguard of the Ship, or of the Goods and Lives of them in the Ship, in the time of Tempest; and this Contribution seems to be so called, because it is proportioned after the Rate of every Man's Averidge or Goods carried. It is derived from the Word *Averia*, Cattle.

*Vide Com. In-
terp. verb.
Average.*

Goods are ship'd in England, and a Tempest ariseth, the Passengers, for saving their Lives, cast them over-board, and another English Ship takes them, the Owners bring *Trower*, it lies, because delivered upon the Land, *Caps versus Tooker*, 2 Roll's Reports, 498.

It is lawful for Passengers to cast Goods over-board out of a Ferry-boat, in Case of a Tempest, for Preservation of their Lives: So if the Ferryman surcharge the Boat with Goods, the Owners of the Goods shall have their Remedy against the Ferryman in this Case of a Surcharge, but not in the other Case, 12 Report 63, 2 Blust. 280.

V. As this Law doth take care that this common Calamity should be born by all the Parties interested by a general Contribution, so the Common Law takes notice of the Misfortune, and makes Provision to indemnify the Master; and therefore if the Party-owner of such ejected Goods, shall bring an Action against the Master or Owners of the Vessel, the Defendant may plead the special Matter, and the same shall bar the Plaintiff.

*12 Jac. in B.R.
Bulstrode.
2 part, fol. 280.
Bird versus
Astcot. 12
Report 63.*

VI. But if the Ship's Gear or Apparel be lost by Storm, the same is not within the Averidge, but is accounted like unto a Workman breaking or spoiling his Tools, except in the avoiding of a Danger, as the flinging the Mast over-board, or the slipping the Tow-Anchor or Boat.

*Leg. 1. ff. de
exercis. action.*

*L. amissa &
Oleron.*

Goods brought secretly in the Ship against the Master or Purser's Knowledge, if ejected, no Contribution is to be had.

*Johannes Lo-
cinus l. 2. c. 7.
de jactu, & 8.
de contributio-
ne.*

This Order is observed generally in the rating the remainder of the Goods by way of Contribution.

If they chance to be cast over-board before half the Voyage performed, then they are to be esteemed at the Price they cost; if after, then at the Price as the rest, or the like shall be sold at the Place of discharge.

*Leg. 1. del.
Mer. exempt.
& leg. Si non
sortem de cond.
in de.*

VII. As the *Common Law* looks upon the Goods and Cargo as a Pawn or Pledge for the Freight, so the *Marine Law* looks upon them likewise as a Security for the answering the *Averidge* and *Contribution*, and that the Master ought not to deliver the Goods till the Contribution is settled, the same being tacitly obliged for the one as well as the other. *Ad Leg. Rhod. l. 2. Si non conservatis.*

*Leg. Navis 4.
ad Leg. Rhod.
And Vinus's
Commentary
fol. 235.*

VIII. If through the rising of the Ship, or the casting or unlightning the Ship, any of the remaining Goods are spoiled, either with wet or otherwise, the same must come into the Contribution for so much as they are made worse.

*Leg. 9 §. 3.
ad exhib.*

IX. If it falls out that a Ship entering into a Port or Channel, cannot make way, and there be a lightning or disburdening of the Ship, then the Contribution falls two Parts to the Lading, and one third to the Ship, except the Ship surpass in value the Lading, or that there is some bad Quality in the Ship it self.

*L. 1. vers.
quod convenit
depos.*

But to prevent that ambiguous Question, if the Party covenants that the Goods shall be delivered at the Port covenanted and appointed, then Condition makes Law.

So for the *Pilot's* Fee and rising of the Ship off Ground, when there is no Fault in the Master.

*Leg. quem ad-
modum pa-
rag. Si navis
ad leg. Aquila.*

X. If two Ships happen to encounter and cross each other, and the Crew swear their Innocency, Contribution must be made by a just Equality; but if one perishes, as there can be no Proportion of the Loss, so no Contribution. The reason that is given, for that otherwise a Skipper might on purpose set an old weak Ship against a strong Ship, and by that Means hedge himself into a Contribution and Recompence. However, this bars not the Owners from bringing their Action against the negligent Master, by which Means he may recoup himself in Damage, if it happen

*Fod. leg. 18
H. 6. num. 52.
3 Inst fol. 146.*

Chap. 6. Of Averidges and Contributions.

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happens at Sea, the Action by the Civil Law is called *Goodwin vers*
Legis Aquile. *Tompkins, Noy*
Rep. 148.

If such a Misfortune happens in the Night at Sea, the Party, if he will compleatly arm himself for his recovery, ought to prove, that he made out Light or Fire, or otherways gave notice by crying or calling out.

XI. If it falls out in the Ship or Vessel, by the indiscreet Stowing or Lading thereof above the Birth-mark, that such Ejection happened, in that Case it has been used by the Marine Laws no Contribution to be made, but Satisfaction is to be answered by the Ship, Master, or Owners. *Lust Sernus. S.*
27. & Si 23.
ad leg. Aquil.

If Salt or Corn be laid loose, or in an heap by divers Persons in one Ship, without Distinction, and the Master delivers to any of them their due Share or Quantity; but before the rest receive their Share or Measure, the remaining Salt or Corn washes or loses, those that had the good Fortune to have their Shares, shall enjoy it without any Contribution to the other Partners. *Lex Mercat. 110.*

XII. If to avoid the Danger of a Storm, the Master cuts down the Masts and Sails, and they falling into the Sea, are lost, this Damage is to be made good by Ship and Lading *pro rata*: Otherwise if the Case happens by Storm or other Casualties. *Ad leg. Rhod.*
leg. 2. §. Si
Conservatis.

No Contribution is to be paid in Case one Ship strike against another whereby Damage happens, but full Satisfaction is to be answered the Merchant in Case of Fault or Miscarriage in either; or an equal Division of the Damage, in Case it happen by a Casualty, as above.

If a Lighter or Skiff, or the Ship's Boat into which part of the Cargo is unladen for the lightning of the Ship, perishes, and the Ship be preserved, in that Case Contribution is to be made; but if the Ship be cast away, and the Lighter, Boat, or Skiff be preserved, there no Contribution or Averidge is to be had, it being a Rule, No Contribution *297.*
but where the Ship arrives in Safety.

XIII. If a Ship happens to be taken, and the Master, to redeem the Ship and Lading out of the Enemies or Pirate's Hands, promises them a certain Sum of Money, for Performance whereof himself becomes a Pledge or Captive in the Custody of the Captor; in this Case he is to be redeemed at the Costs and Charges of the Ship and Lad- *Leg. Rhod. de*
jacfur. l. 2. Si
navis à Pira-
tis.

Lading, and Money, if there be any in her, are contributory according to each Man's Interest for his Ransom.

Moore, fol.

297 pl^e. 443.

Hicks versus

Pallington.

So where a Pirate takes part of the Goods to spare the rest, Contribution must be paid.

But if a Pirate takes by Violence part of the Goods, the rest are not subject to Averidge, unless the Merchant hath made an expresse Agreement to pay it after the Ship is robb'd.

Grot de in-
troduct. jur. Holl.

per. 29. Sueton.

jur. Naut. in

the end of the

thirteenth

Chapter.

But if part of the Goods are taken by an Enemy, or by Letters of Marque and Reprizal, *à contra*.

So likewise in Storm, if the same is done for Preservation of the Remainder.

XIV. In Ejectment the Master or Purser of the Ship shall contribute for the Preservation of the Ship, and also the Passengers for such Wares as they have in the Ship, be it Pearls, precious Stones, and such like; and Passengers that have no Wares or Goods in the Ship, yet in regard they are a burden to the Ship, Estimate is to be made of his and their Apparel, Rings, and Jewels, towards a Contribution of the Loss; and generally all things in the Ship, except the Victualling and Provisions of the Ship, and the Bodies of Men (unless Servants) must bear a proportionable Share in the Contribution.

Beckens ad leg.

Rhod. de jact.

fol. 196, 197,

198.

The Estimate being made of the Goods lost and saved, the Price is to be set down, not for how much they were bought, but how much they might be sold for at the time when the Ejectment was made; and if any thing be flung into the Sea, and endamaged, and afterwards is recovered again, yet Contribution is to be made only for the Damage.

XV. Contribution is to be paid for the Pilot's Fee that hath brought a Ship into a Port or Haven for her Safe-guard, (it being not the Place she was designed for) so to raise her off the Ground when there is no Fault in the Master.

Grotius In-
troduct. jur. Holl.

329. Vinus

and Pickens

Commenta-

ries on the

Laws of

Rhodes, fol.

236.

If a Master of a Ship lets out his Ship to Freight, and then receives his Complement, and afterwards takes in Goods without leave of the Freighters, and a Storm arises at Sea, and part of the Freighters Goods are cast overboard, the remaining Goods are not subject to the Averidge, but the Master must make good the Loss out of his own Purse.

The

The Goods which are lost are to be valued, and the Goods saved are to be estimated, which being known, a proportionable Value is to be contributed by the Goods saved, towards Reparation of the Goods *ejected*, or cast over-board.

In which, regard is always had, not to what might be lost by the Goods lost, but what the intrinsick Damage is by the loss of the same; the which are not to be estimated what they might have been sold for, as what they cost, or were bought for. Locinus, lib. 2. cap. 8, 9, 10.

XVI. But now the Custom is general, the Goods saved and lost are estimated according as the Goods saved were sold for, Freight, and other necessary Charges, being first deducted. The Custom of Places varies this Modus of estimating, the

If there were Plate, Jewels, or the like, in a Trunk, Chest, Pack or Bale, at the time of their Ejection, if there be a *super Cargo*, he ought to give notice, by discovering of the same to the Master or Mariners, otherwise he shall be answered in the Contribution no more than the bare extrinsick Value appeared to be; but the Assurers will hardly fare so well. which is done by Merchants and Mariners indifferently nominated by the Court. Ad Leg. Rhod. S. ult. Instit. de rer. divis. & leg. 9. S. ult. de acq. rer. Dom.

If Contribution shall be settled, and the Merchant will not agree, the Master may detain the Lading, for the same is as tacitly obliged to answer that as the Freight; and if at the *Common Law* the Merchant should bring an Action, the Defendant shall bar him by pleading the special Matter.

If Goods are cast over-board, and afterwards are recovered, Contribution ceases, saving for so much as they are damnified and made worse by reason of such Ejectionment. ff ibid. leg. Navis, S. cum autem.

Note, Goods cast over-board to lighten the Ship, make no Derelict. *5 Co. 107. b.* Leg. 25. D. de prob leg. falsus S. Si iactum D. de furo.

And though such Necessity seems to subject the Lading to Ejectionment, to prevent the Ruin and Destruction of the Persons, yet some Lading seems excepted, and therefore Cannon, and other Instruments or Provisions *consigned to relieve a City*, ought not to be flung over-board; for in such Case the Law imposeth on every Subject, that he prefer the urgent Service of his Prince, before the Safety of his Life. Bacon Max. fol. 17. privilegium non valet contra rem publicam.

XVII. Goods taken upon the Sea, are of three Sorts.
 1. Goods taken by Letters of Mart, by *jus Reprisaliarum*.
 2. Taken from Pyrates or Sea Rovers; And 3. From
 professed Enemies. Those Goods that are taken from
 Pirates, are esteemed to be the just Prize or Prey to any
 taker of them, so that an Account be given of them to
 the Admiral. If a Ship or Goods be taken from a professed
 Enemy, it is to be proceeded in according to the Autho-
 rity whereby it was taken. But if Goods be taken
 by a professed Enemy, and afterwards they are taken
 from him, and the same Owner claims them, they ought
 to be restored to him, for the Law looks upon these Goods
 as received, not taken, yet with some Recompence for
 them. But when such Goods became lawful Prize to the
 Taker, then the Admiral is to have his 10th Part, and
 the Remainder to be proportionably divided between the
 Takers. *Lex Mercat.* 113, 114.

CHAP. VII.

Of Policies of Assurance.

Assurances, by whom first introduced

I. Assurances, the Nature of them.

II. How esteemed of by Law.

V. The various ways of ensuring, and on what.

V. Assurance when esteemed most dangerous, and of fraudulent Policies.

VI. Of the Receipt of Premio, and the custom of Abatement on losses.

VII. Policies that now ensure against all the accidents of Heaven and Earth.

VIII. A Ship ensured generally, whether the same includes the Cargo, and whether it is necessary in the Policy to mention the particular Goods.

IX. If the Master is discharged of the damage, whether the Insurer may be made liable.

X. A Ship ensured from a Port, and she is burnt before her departure, whether the Assurers are made liable.

XI. Goods ensured in one Ship, are afterwards in the Voyage put into another, the second miscarries, whether the Assurers are made liable.

XII. A Man ensures more than the value of the Cargo, the Custom in such case when usurious.

XIII. A Ship is insured from one Port to another, and there to be landed; the Cargo after arrival is sold, and before landed is burnt, whether the Assurers shall be made answerable.

XIV. A Ship insured from one Port to (blank) being in time of War taken, whether the Assurers shall answer.

XV. Of the Ensured's renouncing after a loss; and what operation the same has by Custom.

XVI. Of the Office erected by the Statute of 43 Eliz. what power; of the Jurisdictions claimed by those at Common Law and the Admiralty.

XVII. What Power and Authority was given by the Statute of 43 Eliz. to that Court.

XVIII. What things it was deficient in, and holpen by the Statute of 14 Car. 2. Cap. 23. and of their Authority and Power general at this day.

XIX. Of the Advantages that seem to accrue to publick Assurances, different from private ones.

XX. The Office of Insurance for Houses burnt or demolished by, or by reason of Fire: The Fund to answer the Premium, and the Rates for insuring

A P.

IT is conceived by Suetonius, that Claudius Cæsar was the first that brought in this Custom of Assurance, by which the Danger and Adventure of the Voyages is divided, repaired and born by many Persons, who for a certain Sum, by the Spaniards called Premio, assure Ships or Goods, or both, or a Proportion, according as the Policy is *.

*In vita Claud. Cæsar, lib. 25. cap. 18. * Leg. 1. ff. qui Satisfd. cog. Grotius de Fure Belli ac Pacis lib. 2. cap. 12. S. 3. in fin.*

II. Assurances

*Lex Mercat.**cap. 13. p. 105.*

II. *Assurances* are either *Publick* or *Private*. *Publick* when they are made and entred in a certain Office or Court, commonly called the Office of Assurance on the Royal Exchange in London; and the same are called *Publick*, for that it is free for any Man to resort and see what another hath assured upon his Adventure.

Private is, when an Assurance is made, but the Ensured keeps the same secret, not deeming it fit that any should see or know their Cargo or Adventure, or what *Premio* they have given, or Assurance they have made; and the same being never entred in the Office, is known by the name of a *Private Assurance*.

Form of an Assurance of Goods, outward bound. Laws of the Sea. 585. Appendix to the same. 5.

Another Form of Ships only. Appendix to the Laws of the Sea. 3.

Another on Ship and Goods, *ibid.* Appendix 6.

III. By the *Common Law* they are both of the same validity, as in reference to obtain Satisfaction from the Ensurers, if loss or damage should happen to the Adventure.

43 *Eliz. c. 12.* But by the Proceedings erected by Statute of 43 *Eliz. cap. 12.* only those that are entred in the Office of that Court, can be sued or determined there.

Indebitat Assumpsit pro premio, upon a Policy of Assurance upon such a Ship, the Defendant demurred specially because he did not shew the Consideration certainly what the *Premium* was, or how it became due, *sed non allocat*, for it is as good as *Indebitat pro quodam Salaris*, which hath been adjudged good. *Fowlk cont. Pinsacke 2 Levinz.* 153.

If the Person whose Name is used in the Assurance, be in Time of War taken to be no Friend to the State, there is danger to pay the Assurance. If after the Subscription of the Assurer, the Goods should be arrested and made forfeited, to answer the same to the Prince, as it often happens.

If Goods are stoln or embezeled on Shipboard, the Master, not the Assurer is responsible. So if the Goods be lost in default of the Pilot. *Lex Mercat.* 108, 109.

Chap. 7. Of Policies of Assurance.

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Policy of Assurance to warrant a Ship for 12 Months, if the Ship did not perish within the time of 12 Months, being accounted according to the Months of *January, February, &c.* but within 12 Months reckoning 28 Days to the Month resolved that the Policy was not forfeited as in Sir *Woollaston Dixes's Case* 1 *Leond.* 96. Assurance for 12 Months, how to be construed.

IV. *Assurances* are of various sorts, some being to places certain, others general: Those that are made to places certain, are commonly upon Goods laden or to be laden aboard outward, and until the same Adventure shall be bid ashore at such a Port. Leg. 4, 5. D. de Naut. san.

Or upon Goods laden or to be laden homeward in such Ship till the Adventure shall likewise be landed.

Or else upon Goods out and in, with liberty to touch all Ports as are mentioned in the Policy. Johannes Locinius, l. 2. c. 5. §. 5, 6.

Solikewise on Ships that go Trading-Voyages, as round *Cales*; and that it shall be lawful after the Ships delivery there, to take in at the same Port another Cargo, and with that proceed to the *West-Indies* or other parts and back again to *Cales*, and from thence to *London*; this Policy being general and dangerous, procures seldom subscriptions, or at least very chargeable ones.

As Goods and Merchandize are commonly Ensur'd, so likewise are the Ships Tackle and Furniture; but in regard there seldom happens a Voyage but somewhat is missing or lost, the *Premio* commonly runs higher than for Merchandize. Sautor. p. 3. num. 13. seqq. 43.

Assurances may be made on Goods sent by Land, so likewise on Horses, and the like, and may be made on the heads of Men; as if a Man is going for the *Streights*, and perhaps is in some fear that he may be taken by the *Moors* or *Turkish* Pirates, and so made a Slave, for the Redemption of whom a ransom must be paid, he may advance a *Premio* accordingly upon a Policy of Assurance; and if there be a Caption, the Assurer must answer the Ransom that is secured to be paid on the Policy. Lislever. Sedgwick, Mich. 29 Car. 2. in R. R.

V. Those *Assurances* are most dangerous when there are these words inserted, *lost or not lost*; which is commonly done when a Ship hath been long missing, and no Tidings can be had, the *Premio* (especially in time of War) will run very high, sometimes 30 or 40 per Cent. and though If such Assurance be made in the Office, they then set down the Hour when it intimation is

given of the it happens at the time that the subscription is made, the
loss. Ship is cast away, yet the Assurers must answer.

Locinius, lib. 2. But if the Party that caused the Assurance to be made
cap. 5. §. 9, 10. saw the Ship wreckt, or had certain Intelligence, such
subscription will not oblige, the same being accounted
a meer fraud.

Arthur Stock- So likewise if the Assured, having a rotten Vessel, the
den of Stock- assure upon the same more than she is worth, and after-
den's Case, wards give order that going out of the Port, she should
Mich. 26 Car. be sunk or wreckt, this will be fraudulent, and not oblige
2. in B. R. the Assurers to answer.
Afterwards

convicted by In the Year 1678. one *Nownham Perkins* and *Stow*
Information were Owners of a Vessel called the *May-Flower* Ketch, the
for the fraud, Vessel coming laden with Wines on the account of one
Term. Sancti *Fierbrasse* and *Stone* to the *Isle of Wight*, *Perkins* being the
Hilarii sequen. in the same Place, contrives with one *Ivy* the Master
in B. R. Vide in the same Place, contrives with one *Ivy* the Master
Liv. lib. 25. sell the Freighters Goods privately, and that being effected

ed to go out to Sea some small distance from the *Isle*, and
there privately sink the Vessel, and pretend she struck
and then foundred by the extremity of Weather. The
Plot being laid, *Perkins* hastens up to *London*, and makes
Policy of Assurance on the Vessel; which being done, re-
mits his Orders to *Ivy* to put in Execution the contrivance
and accordingly the Goods, or the best of them, being
disposed of, stands out to Sea, and then with his own
Hands, by the force of an Iron Crow, makes a hole in the
Hold, and then in his long Boat (the Crew perceiving the
Vessel to be sinking) conveys himself and Mariners ashore.
Ivy remits up advice of the loss, and *Perkins* (as if he had
never known any thing of the matter) demands the Money
of the assured with great Confidence, and thereupon brings
an Action for the same; but before the Cause came to
Tryal, *Fierbrasse* and *Stone* bring a Trover against *Perkins*
and thereupon the whole Practice came out, and a Verdict
was had against the Defendant, with this further
That if *Perkins* would proceed on his Actions on the Assurance,
he must expect that this practice and fraud of his
would totally Poison his Assurance, and thereupon being
well advised, never proceeded.

Hill 3. 32 Car.
2. B. R.

The Subscription mentions
as if the Premium had been

VI. Few or Scarce any ensure the whole Ship, but the
Subscriptions being for Sums certain, as 50 l. or 500
at the *Premio* then current, which when the Adventure be-

born they receive ; but if a loss happens, the *Premio* is de- actually recei-
acted together with the usual Abatement : So that the ved, but it is
nsured receive much about 80 per Cent. if a loss hap- seldom done
till the Ad-
venture is
ens.

If an Assurer pays his Money, believing the Ship to born.
lost when it is not, he may bring an *Assumpsit* for the
Money. Cited to be adjudged, *Salk. 22. pl. 2.*

VII. The Policies now adays are so large, that almost all
those curious Questions that former Ages, and the Civil-
ians according to the Law Marine, nay and the common
lawyers too, have controverted, are now out of debate ;
scarce any misfortune that can happen, or provision to be
made, but the same is taken care for in the Policies that
are now used ; for they ensure against Heaven and Earth,
Effects of Weather, Storms, Enemies, Pirates, Rovers, &c.
whatsoever detriment shall happen * or come to the
being ensured, &c. is provided for.

*Ut quæ in na-
ves imposui-
sent, ab hostium
tempestatisque
vi publico peri-
culo essent. Ne-
gotiatoribus
certa lucra pro-
posuit suscepto
in se damno, si*

*quid per tempestates accidisset. Livius, lib. 23. cap. 25. Vide Zesius in Commentario
digesta tit. pro Socio, num. 25. * Sub nomine periculi, de quo fit cautio comprehenditur
omnis casus qui accidit in mari, à tempestate, ab hostibus, prædonibus, repisaliis, ut vocant
peritis aliisque modis ustratis & inustratis citra fraudem & culpam contrahentium, aut de-
mercium vel navis. Grotius de Jure Holl. part. 24.*

VIII. If a Merchant ensures such a Ship generally, and
the Policy it is expressed of such a Burthen, the Ship
happens then to be laden and after miscarries, the Ens-
urer shall not answer for the Goods, but only for the
ship.

*Locinius, lib.
2. cap. 5. S. 7.
9, 10.*

IX. It matters not in the Policy whether the particular
Wares and Goods are Named, but generally upon the
principal Wares, and all other Commodities laden or to
be laden for the Ensured, or for his account, or for any
other.

X. If a Ship be Ensured from the Port of London to Cales,
and before the Ship breaks Ground, takes Fire, and is
burnt, the Assurers in such a case shall not answer, for
the Adventure begun not till the Ship was gone from the
Port of London ; but if the Words had been, at and from
the Port of London, there they would upon such a misfor-
tune have been made liable.

If such an Assurance had been from London to Cales, and
the Ship had broke Ground, and afterwards been driven
by

*Note, The
Port of Lon-*

don extends
from the North
Foreland in the
Isle of Thanet,
over in a Line

to the Naze in
Essex, and
from thence
to London-
Bridge, Rot.

Scaccar. 15

Car. 2.

7 H. 6. 14. in
Quareimpedit,

5 B. 2. Tryal
54.

34 H. 8. tit.
107.

Mich. 30.

31 Elix.

Salk. 444.

Shaa cha.

106. cited in
Show. 315.

* That has
been much
doubted, and
Opinions of
the Court
have general-
ly inclined
against the
Assurers Leg.
ult. ad Rhod.
Digest. Paulus.
lib. 14. tit. 2.
§. 10.

Vide Grot. In-
rod. Jur. Holl.
212. 23. And
indeed is
more the Cu-
stom of Mer-
chants than
Law.

by Storm to the Port of London, and there had took Fire the Ensurers must have answered; for the very breaking of Ground from the Port of London was an Inception the Voyage.

On the other hand, if a Man at Cales ensures a Ship from thence to London, if a loss happens, the Assurer, he comes into England, shall answer by the Common Law for though the place where the Subscription was made and the Premio given was in a Foreign Country, yet this is not material, for the Action that is brought is grounded on the Promise, which is transitory and not local, and so it was adjudged where the Defendant in consideration of 10 l. had ensured, that if the Plaintiff's Ship and Goods did not come safe to London, he would pay 100 l. afterwards the Ship was robb'd on the Sea, and in an Action brought for the 100 l. the Plaintiff had Judgment, notwithstanding the Robbery or Loss was on the main Sea and the Subscription out of the Realm.

If after a Policy of Assurance, a damage happens, and afterwards in the same Voyage a Deviation; yet the Insured shall recover for what happen'd before the Deviation, for the Policy is discharged from the Time of the Deviation only.

XI. If Goods are Ensured in such a Ship, and afterwards in the Voyage it happens she becomes leaky and crazy, and the *super Cargo* and Master by consent become Freighters of another Vessel for the safe delivery of the Goods; and then after her relading, the second Vessel miscarries*, the Assurers are discharged: But if there be these words, *The Goods laden to be transported and delivered at such a place by the said Ship, or by any other Ship or Vessel until they be safely landed*, then the Ensurers must answer the misfortune.

XII. If a Man Ensures 5000 l. worth of Goods, and hath but 2000 l. remitted, now he having ensured a real Adventure, by the Law Marine all the Assurers must answer *pro rata*, if a loss. But by the Opinion of some, only those first Subscribers who under-writ so much as the real Adventure amounted to, are to be made liable, and the rest remitting their Premio 10 s. per Cent. deducted out of the same for their Subscriptions, are to be discharged.

Debt upon Obligation with Condition, to pay so much Money, if a Ship returned within six Months from *Ostend* in *Flanders* to *London* (which was more by a Third part than the Legal Interest of the Money) and if she do not return then the Obligation to be void, the Defendant pleaded that there was a corrupt Agreement between him and the Plaintiff, and that at the time of making of the Obligation that he should have no more for Interest, than the Law permits, in case the Ship should ever return, and avers that the Bond was entered into by *covin* to avoid the Statute of Usury. *Per Hales* clearly this Bond is not within the Statute, for this is the common Way of Assurance, and if this were void by the Statute of Usury, Trade would be destroyed, for it is a casualty whether ever such Ship shall return or not, but he agreed the Averment was well taken, because it disclosed the manner of the Agreement. *Hardres* 418. *Joy* against *Kent*.

Action upon the case, upon a Policy of Assurance of Goods from *London* to *Naples*; the Adventure was to begin in time of the Lading at *London* (dangers of the sea only excepted) with this Clause, warranted to depart with Convoy, the Ship departed with Convoy, but was separated from the Convoy, by stress of Weather, and put into *Torbay*, and was there detained by contrary Winds, afterwards the Master of the Ship expecting to meet the Convoy, departed out of the Harbour, but could not meet the Convoy, being hindred by stress of Weather, the Ship was taken by the *French*. Judgment *pro Quer* *Efferies* against *Lagendra*.

To depart with Convoy.
Show. 320.
4 *Mod.* 58.
3 *Lev.* 320.
Salk. 443.

Case upon a Policy, which was to insure the *William* Galley, in a Voyage from *Bremen* to the Port of *London*, warranted to depart with Convoy: The case was, the Galley set sail from *Bremen* under Convoy of a *Dutch* Man of War to the *Elb*, where they were joined with two other *Dutch* Men of War and several *Dutch* and *English* Merchant Ships, whence they sailed to the *Texel*, where they found a Squadron of *English* Men of War and an Admiral; after stay of 9 Weeks, they set out from the *Texel*, and the Galley was separated in a Storm, and taken by a *French* Privateer, taken again by a *Dutch* Privateer, and paid 1/2 Salvage. And it was ruled by *Holt* C. J. That the Voyage ought to be according to Usage, and that their going

going to the *Elb*, tho' in Fact out of the Way, was no Deviation; for till after the Year 1703. there was no Convoy for Ships directly from *Bremen* to *London*: And the Plaintiff had a Verdict. *Bond v. Gonsalse*, February. 14. 1704. coram Holt C. J. at Nisi Prius at Guildhall.

Locin. l. 2. c. 5.

S. 9. And by the Laws of *Antwerp* there is a time allotted after the Ships arrival at her port howlong the Adventure is to be born by the

Ensurers, which is about 15 days

Art. 13. Affe-

eur Antwerp.
Case of Monsieur Gourdan
Gouverneur of
Cales, Anno
1585.

XIII. A Merchant Ensures his Goods from *London* to *Sally*, and there to be landed; the Factor after arrival having Opportunity, sells the Cargo aboard the same Ship without ever unlading her, and the Buyer agrees for the Freight of those Goods for the Port of *Venice*; before she breaks Ground the Ship takes Fire, the Assured and Buyer are absolutely without remedy; for the Property of the Goods becoming changed, and Freight being contracted *de novo*, the same was as much as if the Goods had been Landed.

And so it is if the Factor after her arrival had contracted for Freight to another Port, and the Ship had happened to take Fire, the Assurers are hereby absolutely discharged for ever.

XIV. If a Ship be Ensured from *London* to and blank being left by the Lader to prevent her surprize by the Enemy, in her Voyage she happens to be cast away, though there be private Instructions for her Port, yet the Ensured sit down by the loss, by reason of the uncertainty. So a Blank is left in the Policy for the value of the Ship or Lading, if a loss, and there be not words that may supply, the Ensured may endanger the Policy.

A taking of a Ship (that is insured) by Pirates is to be understood, the Perils of the Sea. *Pickering* against *Barkley Stiles* 132. 2 *Rolls Abr.* 248.

Where Goods are redeemed from a Pirate, contribution must be paid by all, because the Redemption is made for the safety of all, but if the Pirate be once Master of all, and yet take but some special Goods, whether from Ship or Merchant, and not as a Contentation for sparing of the rest, in this case, because the Remainder is not assured thereby, but freely spared, no Contribution is to be made for the taken Goods to charge any Assurer with any part thereof. So Contribution shall be made for Goods spoiled by Wet, or other accident. Again if it be needful to lighten a Ship for her easier entry into Harbour or Channel, two parts of the Loss fall upon the Goods,

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Goods, and the third upon the Ship, unless the Ship is more worth than the Lading, and the charge of the Goods be not the Cause of her inability to enter, but some bad quality proceeding from the Ship its self, or that otherwise it be provided in the Charter-party. *Lex Mercat.* 109.

XV. After notice of Loss, the Ensured, (if he doth think fit) for that he hath Ensured the most of his Adventure, or that he would have the assistance of the Assurers; when there is hope of Recovery of the Adventure, he may then make a Renunciation of the Lading to the Assurers, when he comes in himself in the nature of an Ensurer, for so much as shall appear he hath born the Adventure of beyond the Value Ensured.

Locinius lib. 2. cap. 5. §. 8.

But if the Merchant shall not renounce, yet there is a power given in the Policy for him to travel, pursue and endeavour a Recovery (if possible) of the Adventure after a misfortune to which the Assurers are to contribute, the same being but a trouble to give ease to the Assurers.

If prohibited Goods are laden aboard, and the Merchant ensures upon the general Policy, which always contains these words: *Of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Fetterzons, Letters of Mart, and Countermart, Arrests, Restraintments and Detainments of Kings and Princes, and all other Persons, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes whatsoever they be, and howsoever they shall happen or come, to the hurt and detriment of the Goods and Merchandize, or any part or parcel thereof; whether if such Goods be lawfully seized as prohibited Goods, the Ensurers ought to answer? It is conceived they ought not; and the difference hath been taken, where Goods are lawful at the time of Lading to be imported into that Country, for which they are consigned for; but by matter ex post facto after the lading they become unlawful, and after arrival are seized, there the Assurers must Answer, by virtue of the Clause, And all other Perils, &c.* But if the Goods were at the time of lading unlawful, and the Lader knew of the same, such Assurance will not oblige the Assurers to answer the loss; for the same is not such an Assurance as the Law supports, but is a fraudulent one.

Sub nomine periculi, de quo fit cautio, comprehenditur omnis casus qui accidit in mari, à tempestate, à hostibus, prædonibus, reprisaliis, ut vocant armatis, aliisque modis usitatis citra fraudem, et culpam contrahentium aut domini

T

A Po-

*mercium vel
navis. Grotius
de Introd. Jur
Roll. par. 24.
In hoc contractu
bona fide
versandum est,
ut natura ulro
citroque obliga-
tionis postulat.
Locinius. lib.
2 cap 5. §. 8.*

*Isaac Houbland
versus Edmund
Harrison. Hill.
31, 32 Car. 2.
in B. R. Judg.
in Pasch. seq.*

*Like Judg-
ment was gi-
ven against
Lethulier adf.
Houbland,
Trin. 32 Car.
2. in B. R. Rot.
158.*

A Policy was made from *Cadiz* to *Vera Cruze* in *New Spain*, upon Monies lent upon Bottomry, and upon any kind of Goods and Merchandize whatsoever loaden aboard the Good Ship called the *Noustra Seignora del Carmen*, and *Mary Magdalen*, the Adventure beginning immediately from the lading before a day to come, and the Monies from the time they were to be lent, and so to continue from *Cadiz* to *Vera Cruze*, and after Delivery with Proviso to stay at any Port or Place in her Voyage and likewise to touch at *Porto Rico*, and there to lade and unlade without any Prejudice to the Ensurance, the Cargo being valued at 1700 l. sterl. without account, &c. against Seas, Men of War, Fires, Enemies, Pirates, Rovers, Thieves, Fetterzons, Letters of Mart and Countermart, Surprizals at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition or Quality served. The Ship being laden at *Cadiz*, did depart towards *Vera Cruze*, and before arrival there, touching at *Porto Rico* the Goods were there seized and arrested, in an Action brought upon the Policy; the Defendant came in and pleaded, That the Ship at her arrival in her Voyage at the Port of *Rico*, was laden with Goods and Merchandize prohibited, and the same, and also the Ship, did thereby become forfeited by Default of the Proprietors, and was there seized and taken. The Question was, if the Owner should ensure, and then order prohibited Goods to be laden, whether that an Arrest upon the same should entitle them to a Recovery? The second Objection was, (as the Defendant had pleaded this Plea) the same was good? As to the first, the Court did all incline, that the Ensurance ought to be *bona fide*, i. e. the Restraints ought to be of such Goods as by Law were not restrainable; but surely that cannot be, for the Intention of Policies are to warrant the Perils of all manner of Goods in all manner of Cases. So that if there be a loading *bona fide*, be it prohibited or not, the same in Case of Loss ought to be answered, unless it were a fraudulent Contrivance. But to the second, it was resolved, That the Plea was insufficient; for admitting the same should not oblige the Ensurer, yet because the Defendant did not shew that the Goods were laden either by the Ensured, or by the Factor or Order, otherwise the same should not conclude them.

them; for perhaps the Master or his Mariners, or a Stranger, might load them on Board without Order, so that upon the meer Insufficiency of the Manner of Pleading, and not of the Matter, the Court gave Judgment for the Plaintiff.

But if a Merchant will Freight out Wool, Leather † and the like, or send out Goods in a Foreign Bottom *, and then make a Policy, the Ship happens afterwards to be taken, by Reason of which there becomes a Forfeiture of Ship and Lading, the Ensurers are not made subject to answer the Damage; for the very Foundation was Illegal and Fraudulent, and the Law supports only those Assurances that are made *bona fide*; for if otherwise, and Men could be ensured against such Actions, they would destroy Trade, which is directly to thwart the Institution and true Intentions of all Policies.

But if Goods should happen to be lawfully Ensured, and afterwards the Vessel becomes disabled, by reason of which they relade by consent of the *super Cargo* or Merchant, into another Vessel, and that Vessel, after arrival, proves the Ship of an Enemy, by reason of which the Ship becomes subject to Seizure; yet in this Case Ensurers shall answer, for that this is such an Accident as is within the Intention of the Policy.

Ritterish. ad
leg. contract.
23. de Reg. jur.
cap. 18. pag.
236, 237.
Stryman dicto
Cro. num. 335.
Inst in pr. quib-
mod. ver. con-
tractab. re. l. 2.
Si cert. peti.

Several Men lade aboard Salt, without distinction, not putting them in Sacks, and the like; the Ship arrives, the Master delivers to their Principals according to their Bills of Lading as they come one by one, it falls out that some of the Salt is wash'd or lost by reason of the Dampness of the Ship, and that the two last Men cannot receive their Proportion. There are in this Case these things to be considered:

1. Whether the Master is bound to deliver the exact quantity?
2. Whether those that have received this Loss can charge the Assurers?
3. Whether the Assurers can bring in the first Men for a Contribution, they having their Salt delivered to them complearly?

Hill. 11 Jac.
in C. B. Laflaw
and Tomlin-
son's Case, Ho-
bart, fol. 88.
Leg. quod con-
venit de verb.

Certainly the Master is not bound to deliver the exact Quantity, nor is he obliged to re-deliver the very specifical Salt, but only as Men are to repay Money or Corn by the distinction in a Bag or Sack, and out of them; but if

the ob.

the Fault was in not pumping, keeping dry his Deck, and the like, there *è contra* : Though perhaps there may be special Agreement,

Besides, this is a Peril of the Sea which the Master could not prevent, and of necessity he must deliver to one first before another.

As to the second, It is no Question but that the Assurers shall answer. But whether they shall bring in the first Man for Contribution, may be some doubt.

D. Leg. in mare.

It has been conceived by some, that they ought not for they delivered their Salt to the Master *tanquam in Creditum*, and was not to expect the redelivery of the same specificall Salt : Besides, the Master must of necessity deliver to one Man before another.

But by others it has been conceived they ought to contribute *pro ratione* ; for as Goods of necessity, some must be bestowed in the Hold, and that such Goods seldom escape the Peril of the Sea ; so the rest must of necessity contribute to that Misfortune, and so make no Distinction.

The Bills of Lading are very useful to settle the Difference between the Assurer and Assured, of which there are three Parts, one sent over Sea, the other left with the Master, and the last remaining with the Lader.

XVI. The Office of Assurance was erected by the Statute of 43 Eliz. cap. 12. which reciting ; ' That whereas Differences growing upon Policies of Assurances had been ordered by discreet Merchants, approved by the Lord Mayor, who did speedily decide those Causes, until that of late Years divers Persons did withdraw themselves from that arbitrary Course, and have sought to draw the Parties assured to seek their Monies of every several Assurer by Suits commenced in her Majesty's Court to their great Charges and Delay : Whereupon it was Enacted, That the Chancellor or Keeper, for the time being, should issue forth a standing Commission (to be renewed Yearly, or as often as to him shall seem meet) for the hearing and determining of all such Causes arising on Policies of Assurance, as shall be entred in the Office of Assurance in London.

The Judges or Commissioners appointed, are the Judges of the Court of Admiralty, the Recorder of London, two

Doctors

Doctors of the *Civil Law*, two Common Lawyers, eight grave and discreet Merchants; or to any five of them: and that they, or the greatest part of the Commissioners have power to Hear, Examine, Order and Decree all such Causes in a brief and summary way, without formality of Pleading.

They have Power to summon the Parties, examine Witnesses upon Oath, commit to Prison upon refusal of Obedience to their Decrees; they are to meet once a Week at the *Assurance-Office*, or some other convenient publick Place, and no Fees at all are to be exacted by any Person whatsoever.

§. 2.

There lies an Appeal from their Sentence to the Lord Chancellor or Lord Keeper (but the Party must deposite the Monies decreed, and then, though the Party be imprisoned, he may be discharged) and then it lies in the Lord Chancellor's or Keeper's Breast to affirm or reverse, and to award the Party assured double Costs.

§. 3.

No Commissioner being Party Assurer, can act by virtue of this Commission, nor until he hath taken his Corporal Oath before the Mayor and Court of Aldermen, to proceed uprightly and indifferently between Party and Party.

§. 4.

XVII. This was a good act, had it been as carefully open'd as was intended; for there were many things which this Act did not extend to.

First, Any Man may at this Day make a private Policy notwithstanding this Act, which is as good and effectual in Law to all intents and purposes, as one made and entered in the said Office; and that such a Policy might and may be now sued at the *Common Law*.

Secondly, The Number of Commissioners being so great, that there could be no Court without five at the least; and without a Court they neither could summon Parties, or examine Witnesses, and that was very difficult to get.

Thirdly, If the Parties or Witnesses refused to appear they had no power to punish the Party for the delay, with Costs or otherwise, which was very mischievous.

Fourthly, No Commissioner could sit before he was sworn: Commissions and the Commissioners being often renew'd, it was a trouble to be attending a Court of Aldermen.

Aldermen, which was difficult some times of the Year to get.

Fifthly, Though they had power to commit the Party who refused to obey their Decree, yet they had no power to make any Order against the Ship.

14 Car. 2. cap.

23. §. 2.

Which Matters being taken into consideration, it was Enacted, That Three Commissioners, whereof a Doctor of the *Civil Law*, and a Barrister of five Years standing to be one, should make a Court, and to act as any five before might have done,

§. 2. par. 2.

They have likewise power now given them to summon Parties and Witnesses, and upon contempt or delay in the Witnesses upon the first Summons and tender of reasonable Charges, or Costs; and in the Parties upon the second Summons, to punish the Offenders by Imprisonment.

§. 2. par. 3.

§. 4. par. 2.

Every Commissioner is now to take his Oath before the Lord-Mayor, to proceed uprightly in the execution of the said Commission; and any of them may administer an Oath, so as the adverse Party may have notice, to the end such Person may be fairly examined.

§. 3.

Commissions may issue out of the Court of Admiralty for examining of Witnesses beyond Seas, or in remote Places by Directions of the Commissioners, and Decrees may be made against Body and Goods, and against Executors and Administrators, and Execution accordingly, and assess Costs of Suits as to them shall seem just.

But Execution cannot be against Body and Goods for the same Debt, but the Party must make his Election as at the *Common Law*.

Oyles versus
Marshal, Styles
Rep. 418.
1654.

Dowdale's
Case, Coke lib.
6. fol. 47. 36.
Eliz. in B. R.

38 H. 8. Crane
and Beile. Coke
4 Inst. fol.
138, 139.

XVIII. But these Statutes took not away that Cognizance which the Courts at *Westminster* claim'd upon such Contracts by the *Common Law*; but only gave this new erected Court a concurrent Jurisdiction with those at the *Common Law*: For though the Loss happened out of the Realm, yet they had Jurisdiction of the Cause. And therefore if an Action be brought upon a Policy of Assurance, though the Loss happen'd at Sea, yet the Jury shall enquire; for the Loss is not the direct Ground of the Action, but the *Assumpsit*.

The Admiralty have likewise put in, if not for an absolute Jurisdiction, yet at least a concurrent one; yet

both have been denied them, notwithstanding that the Judge of the Admiralty is Judge of the Court of Assurance.

Suit depending, on a Decree in the Court of Policy of Decree in the Insurance, (which is but in the nature of a Court of Court of Policy, no Barr in an Action at Law. Equity) or in a Court of Equity, is no Barr in an Action at Law, and therefore if the *Chancery* should make a Decree upon a Covenant, upon which an Action lies at Common Law, the Party notwithstanding this Decree may have his Action. *Came against Moy 2 Sid. 121.*

XIX. By the making of an Office-Policy, according to the Statute, *these Advantages will follow.*

1. If the Policy be lost, if the same be entred with the Register of the Office, the Entry is effectual to answer the Matter, both at the Common-Law, as well as in the same Court; but a private Policy lost, is like a Deed burnt, unless that there be very strong Evidence, as a Copy, and the like, it will be of little value. So that then there will remain nothing but an equitable Relief in *Chancery*, for the satisfaction of the Party.

2. If a Man Freights out a Ship from London to *Cales*, and assures here, he may write to his Correspondent to make an Assurance there of the same; if the Matter comes before Commissioners, they may examine the Insured upon Oath, and determine therein according to Law and the Custom of Merchants: But at the *Common Law* the same cannot be, but Relief must be had in that Point according to Equity in *Chancery*.

3. The same is the Court of *Equity* as well as Court of Law; so likewise a Court to adjudge according to the Custom of Merchants.

4. They may Decree against Twenty Assurers at one time, but at Law they must be sued distinctly.

5. They may proceed out of Term as well as in Term, and (if the Matter will bear it) they may finish a Cause in a Fortnights time and less.

6. The Judgments there given are generally upon mature Deliberation, and by Persons well skill'd in Marine Affairs; and if their Sentence is thought to be unreasonable, the Lord Chancellor or Lord Keeper may, on Appeal determine the same.

7. The

The Bail, on a Writ of Error, can't render the principal; for they undertake that he shall pay the Money, or they will do it for him.

3 *Fac. c. 8.*

3 *Car. I. c. 4.*

§. 4.

Cro. Jac. 402.

7. The Parliament has had so special a regard to the Judgments given in this Court, that no Appeal from thence can lie till the whole Monies decreed are deposited, and the full Costs paid to the Appellee; which is more expeditious and advantageous than having of Bail at the *Common Law*; for in such a Case, after the Plaintiff hath spent his Monies, and been delay'd three or four Terms, and with much Difficulty and Charge got Judgment, the Defendant or his Bail may render him to Prison in discharge of themselves. So that although this Court cannot compel the Defendant to put in Bail, yet the Sentence there being so swift from which there is no Appeal till the Monies are paid down, the same seems to be of great convenience to the Assurers as well as the Assured.

XX. There is another Office of Insurance, but that is for Houses burn'd or demolish'd; for the securing the Insured in case of Loss, Ground-Rents to the value of near 3000 *l. per Annum*, are settled on Trustees to answer the same. The *Premium* or Rate of Insuring an Hundred Pounds on Brick Houses, is Eight Shillings for one Year (and double for Timber) and so in proportion for a lesser Sum; and if any Insure for a longer Term, the Discount for paying down the Money, is after this rate: Three Years and a Quarter is paid for four Years Insurance; five for seven Years; and seven for eleven. The Money Insured on the House is to be paid as often as the House is burn'd or demolish'd within the Term Insured; but if damaged, then to be repair'd at the Charge of the Office. This excellent Security for such Misfortunes, His Majesty has highly approv'd of in Council; and for the better encouraging the Undertakers and first Inventors, has been lately graciously pleased to grant his Letters Patents to them for carrying on so great and good Work for the good of the Publick.

C H A P. VIII.

Of Prifage and Butlerage

- I. What Prifage is, and where taken, and of what.
 II. Merchant Strangers exempted from the same.
 III. When due, and the exemption of the Citizens of London from the same.
 IV. What Citizens are capable and where not.
 V. A Foreigner imports and makes a Citizen Executor and dies; whether he shall have the Benefit of the Immunity.
 VI. Where a Foreigner sells to a Citizen before Bulk be broken, the Vendee shall be chargeable.
 VII. Where a Grant to discharge a particular Ship shall be good; and where a Grant to particular Persons shall be otherwise.
 VIII. Of Butlerage, what, and who are exempted.
 IX. Where the King becomes entitled to those Duties.
 X. A Grant to be free of all Customs, Impositions, &c. extends not to Prifage and Butlerage.
 XI. Cinque Ports exempted from Prifage.

Prifage is a certain taking or purveyance for Wine to the King's use; the same is an ancient Duty which the Kings of England have, time out of mind, had and received; the manner hath been by taking of every Ship or Vessel that should come into this Realm, if ten Tun, to have for Prifage one Tun: And if it contain 20 Tun or more, to have two Tun (*viz.* one Tun before the Mast,) and the other behind the Mast, paying 20s. for each Tun. This ancient Immunity they have enjoyed as a Flower of the Crown, and by some has been conceived not grantable away without Act of Parliament. But yet in 6 E. 3. fol. 3. Case 15. mentions the same to be grantable over.

II. King Edward the First having laid some Impositions on the Merchants, which in Anno 25. of his Reign, being taken away, with promise, that neither he nor his Successors should do any such thing without Assent of Parliament. In the one and thirtieth of his Reign they granted him an increase of Customs; in lieu of which he granted them many Immunities, as Release of Prifage; &c.

F f

III.

Dyer 91. 42.
165.Fleta, l 2. c. 2.
Salk. 617.Rot. Parl. 31.
E. 1. cap. 1, &
2.

Trin. 5 Jac.
in B. R. Ken-
icot and Bog-
gen's Case.
Telv. 198.

III. *Prisage* is not due till the unlading, or that which is commonly called breaking of Bulk; for the Words are *De qualibet navi important, vina, & disonerant inde.* King Edward the Third by his Charter dated 6 Martii Anno Regni Primo granted his Royal Charter of discharge to the Mayor, Commonalty, and Citizens of London, in hæc verba, (viz.) *Quod de vinis Civium nulla prisæ fiant, sed perpetuè inde essent quieti, &c.* which was afterwards allowed in the *Exchequer*.

4 H. 6.
Knowl's Case
3 Bulstr. 4.

IV. It is not every Citizen that is capable of this Privilege, but only those that are resident within the City: And so it was rul'd in the Case of one *Knowl*, who being a Citizen and free Grocer of London, removed his Household *cum pannis*, and did dwell at *Bristol*, but yet kept his Shop in London; and a Ship of his arriving with Wines at London, and being unladen, the *Prisage* was demanded; he claimed the Benefit of discharge. It was adjudged, he was not capable of the same: For he that will claim the benefit of this discharge ought to be *Civis & incola commorans*.

3 Bulstr. 4, 5.

By 24 H. 6. (a private Act of Parliament) Complaint was made, That the Lord Mayor of London would make Strangers Citizens; It was there declared, that this benefit to be discharged from Payment of *Prisage*, did not extend to such Citizens as were *donati*, made free, but unto those Citizens only which *commorant, incolant*, and are resident in the City.

3 Bulstr. 3.

V. If a Foreigner brings a Ship laden with Wines, into the Port of London, and then makes a Citizen his Executor and dyes, he shall not have the benefit of this Immunity from Payment of *Prisage* for these Wines for that they are not *bona Civium*.

3 Bulstr. 10.

VI. If a Foreigner arrives with a Ship laden with Wines at a Port with an intent to unlade, and before the Goods are entred, or Bulk is broken, he sells them to a Citizen, *Prisage* shall be paid notwithstanding, for it was never the Intent of the King in this his Grant to discharge a Citizen in such a manner.

3 Bulstr. 10;
11.

VII. If the King does discharge such a Ship of *J. S.* being at Sea, particularly naming the same, from the Payment of *Prisage*, and he dies before the Ship arrives, no Duty can be demanded.

But

But it has been held, if a particular Person has a Grant to him to be discharged of his Goods, and he dies before the arrival, the Duty shall be paid.

Vide the Case at large for the Court was divided in Opinion.

Hanger's Case, Calstr. Rep. 33, 3 Bul. 1. 1 Ro. 138.

Quo Warranto's were brought against three Archbishops of *Tork*, to shew cause why they demanded to have *Prifage* for Wines brought into the Port of *Hull*: The two first pleaded to have only the first taste, and a pre-emption after *Prifage* paid; but the third pleaded a Charter of 15 E. 2. by force of which he claimed the same; and Rul'd not good. But though the Charter might be good, yet it was held in that case, a disclaimer by the Predecessor should bind the Successor. Note, at this day the Duke of *Ormond* in *Ireland* hath an Inheritance in the *Prifage* of Wines by the King's Charter.

Bro. tit. disclaimer, fol. 47. 3 Bulstr. 153. 6 Ed. 3. fo. 5, 6. Archbishop of Tork's Case.

VIII. *Butlerage* is a Custom due from Merchant-strangers of 2s. upon every Tun of Wine brought into this Realm by them; but *English* Men, pay it not.

King *John* granted to the Merchants of *Aquitain* Trading for Wines thence into *England*, divers Liberties, and amongst others, *Libertatibus concessis Mercatoribus vinetariis de Ducatu Aquitania reddendo Regi & heredibus suis 2s. de quolibet dolio vini ducti per eosdem infra Regnum Anglia vel protestatem Regis.*

Sir John Davies in the Case of Customs.

In libro Rubro in Scaccario Remem, fol. 265.

All Merchants Strangers in consideration of the Grant to them by the King of divers Liberties and Freedoms, *Concesserunt de quolibet dolio vini quod adducunt vel adduci facerent infra Regnum, &c. solvent nobis & heredibus nostris nomine Custum & duos solidos, &c.*

Rot. Chartarum, Anno 31. E. 1. num. 44. called charta Mercatoria. See the Charter at large in the Chapter of Customs.

It is called *Butlerage*, because the King's chief Butler doth receive it. If any Person free of *Prifage* or *Butlerage* customs Wines of a Person not free of *Prifage* or *Butlerage*, he forfeits double the Value of the *Prifage* of the Wines so customed.

1 H. 8. c. 5. Ed. 6. 22. 2.

IX. Breaking of Bulk is that which entitles the King to the Duty: For if a Merchant imports Wines to the Number of 20 Tuns, yet if he unlades but part, as nine or four Tuns, yet the King shall have the entire *Prifage*; and though the Custom seems to declare, that the taking must be as well before as after the Mast, yet is not the Officer tyed to that strictness but may take where he pleases; for two Tuns are the Kings due; for o-

Kenicot versus Hoggan, Yelverton. 198 Boynton's Case; 3 Rep. 44. 10.

therwise he might be cozened, the Freighter perhaps lading other Commodities aboard after the Mast.

If there be but one Tun taken out, yet the duty must be paid: The reason is, for that otherwise the Officer should be obliged to travel perhaps all over the Kingdom.

X. The King granted to a *Venetian Merchant* that he should be quit, *de omnibus Custumis, Subsidis, & Impositionibus, & omnibus aliis denariorum summis debitis & solvilibus pro quibuscunque Merchandizis importandis*; and that he should be as free as the Citizens of *London*. In that case it was adjudged in the *Exchequer*, That by that Grant the King did not discharge him of *Prifage*, because the *Prifage* was not specially expressed in the Grant, although that the City of *London* were by a special Charter freed of *Prifage*.

Vouched in
the Case of
Customs in Sir
John Davies
Reports.

Cl. 1 E. 1 m. 5.

Bulstrode. 3 part
fol. 1.

XI. The Cinque Ports are likewise discharged of *Prifage*; yet if a Citizen of *Salisbury* should consign Wines to be delivered and unladed at *Dover*, the bare discharge of the Goods at that Port will not acquit the Importer from the Duty; for it is not the Parties Importation, but his Domicil that qualifies him for the benefit of his Immunity.

C H A P. IX.

Of Pilots, Wharfage, Primage, Average,
Lodmanage.

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| <p>I. <i>Of the Pilots charge till the Ship is brought to her place or bed.</i></p> <p>II. <i>If the Ship is likely to miscarry, what the Ships Crew may do at such time.</i></p> <p>III. <i>Of ignorant Pilots their punishment, and if the Ship miscarries, who shall answer.</i></p> <p>IV. <i>Of Wharfage, and where the Wharfingers shall an-</i></p> | <p><i>swer, and where not.</i></p> <p>V. <i>Primage and Petilodmanage where due, and for what; and if the Ropes break, whether the Master, or Wharfinger shall answer.</i></p> <p>VI. <i>Petty Average where due, and for what, and Hat-mony.</i></p> <p>VII. <i>Lodmanage where due, and for what.</i></p> |
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I. **B**Y the Laws of Oleron after that the Pilot hath brought the Ship to sure Harbour, he is no further bound or liable; for then the Master is to see her bed and to her lying, and bear all the rest of her Burthen, Charge, and Danger, except that of the act of God; So that before she comes to her place or bed, and while she is under the Pilot's charge, if she or her Goods perish, or be spoiled, the Pilot must make good the same.

II. By the Laws of Oleron, if his fault is notoriously *Leg. Oleron, cap. 23.* gross, that the Ships Crew sees an apparent Wreck, they may then lead him to the Hatches, and strike off his Head; but the Laws of *England* allow no such hasty Execution.

By the Laws of *Denmark*, an ignorant Pilot is to pass thrice under the Ships Keel.

The Master generally in the Charter-party covenants to find a Pilot, and the Merchant covenants to pay him his Pilotage.

III. But if a Ship should miscarry coming up the River, under the charge of the Pilot, it has been a Question, whether the Master should answer in Case of the insufficiency of the Pilot; or whether the Merchant may have his remedy against both? It hath been conceived the Merchant hath his election to charge either;

and if the Master, then he must lick himself whole of the Pilot.

22 Car. 2. c.
11. §. 21.

IV. *Wharfage* is Money paid for landing Wines at a Wharf, or for shipping or taking in Goods into a Boat or Barge; they commonly keep Boats or Lighters of their own for the carrying out and bringing in of Goods, in which if a loss or detriment happens, they may in some cases be made liable.

Randall versus
Hilton & But-
ler, Pasch. 26.
Car. in B. R.

An Action of the Case grounded on the Custom of the Realm was brought against the Defendant, Master of a Wharf, for not safe delivering of Goods, &c. The Case appeared to be thus: The Master unladed a Bale of Silk into the Wharfingers Lighter, and sent part of his Mariners to convey it ashore; it happened that the Goods were stole: The Question was, Whether the Wharfinger or the Master should answer? Upon a Tryal at *Guild-Hall* before my Lord Chief Justice *Hales*, it was there Rul'd, That the Master was liable, and not the Wharfinger; for till they are landed, the Master hath them under his Power: But if Goods are to be sent aboard, there if they miscarry in their Passage, the Wharfinger must answer.

32 H. 8. 14.
Cowel Interp.
verb. *primage*.

V. *Primage* and *Petlodmanage* is likewise due to the Master and Mariners for the Use of his Cables and Ropes to discharge the Goods, and to the Mariners for loading and unloading of the Ship or Vessel; it is commonly about twelve Pence *per Tun*.

Leg. Oleron,
cap. 10.

If the Ropes break in hoisting of Goods out of the Ship into the Lighter or Boat, the Master must answer if the Goods be damnified or lost.

But if the Ropes break at the Crane in taking them out of the Lighter, (although till they are landed, they are not out of the Masters Custody) yet the Wharfinger shall answer.

Some conceive that the Average mentioned in the Bills, is that which is the Average or Contribution for losses.

VI. *Petty Average* is another little small Duty which Merchants pay to the Master when they only take Tunnage over and above the Freight, the which is a small recompence or gratuity for the Masters care over Lading; and in the Bills of Lading they are expressed after Freight, together with *Primage* and *Average* accustomed.

The *French* Ships commonly term the Gratuity *Har-*
money.

money, and our *English* Merchants pay it our Masters over the Freight; it is sometimes more, sometimes less; two or three Pieces.

VII. *Loadsmen*, is he that undertakes to bring a Ship safe through the Haven to the Key or Place of Discharge, and if through his ignorance, negligence, or other fault he suffereth the Ship or Merchandize to perish, an Action lyes against him at the *Common Law*; and so by some conceived he may be punished in the Admiralty; but not in both.

The Hire is called *Lodmanage*, the which the Pilot receives of the Master for conducting the Ship up the River, or into the Port to her convenient Bed.

If two Ships lye in a Harbour and the Anchor of one is feared may occasion damage to the other, if after request and refusal (and there be probable cause) the other may take up the Anchor, and let the same down at a further distance, and the same, if opposed or hindered and any damage happen thereby, they are to make full Satisfaction; so it is if they lay out an Anchor, and neglect the placing of a *Buoy* to the Anchor, and damage happen thereby, they are not only subject to be punished in the Admiralty, but likewise to render satisfaction to the Party damnified.

If two Ships be in the River, and the one falls foul on the other, both being laden, by the Law Marine the Contribution is to be in Common, and to be equally divided and appraised half by half; but then the *Mariners* must swear there was no fault in them: For otherwise one that hath an old rotten Vessel which he can no ways dispose of, may so order the matter as to lay her in the way of a good Ship under Sail, so that the same may be answered in damage: But when the Contribution is made equal, then the Contrivance will be avoided; but at the *Common Law* there can be no such Judgment, for one of them must be found guilty; and if so, he must answer the others Damage, and for his own he may sit down by the loss,

Roughton, Artic. Enquiry, fol. 27, 28.

Per Leg. Oleron. cap. 15.

Per Leg. Oleron. cap. 14.

C H A P. X.

Of Bills of Exchange.

- I. Of the Antiquity of Exchange by the Hebrew Law.
- II. Of the Antiquity of Exchange by the Romans.
- III. Of Exchanges by other Nations in imitation of those People.
- IV. Of the several sorts of Exchanges, and of Cambio commune.
- V. Of Cambio real, or Exchanges value for value.
- VI. Of Cambio sicco, or dry Exchanges.
- VII. Of Cambio fictitio, or feigned Exchange.
- VIII. Of the Exchanges used this day, and on what.
- IX. How Exchanges are made, and upon Monies in London.
- X. Monies paid generally, how repaid by Exchange, how an Action shall be brought for Guineas, or Foreign Coin.
- XI. Of Bills of Exchange payable at single usance.
- XII. Bills of Exchange at double or treble usance, and of the customary usances to certain places from London and Amsterdam to other places.
- XIII. Of the nature of Bills of Exchange, and how esteemed of by the Laws of England.
- XIV. Bills drawn more than one, no prejudice to the Parties; and of the true measure of judging on Bills by Custom.
- XV. What amounts to an acceptance generally, and on refusal where to be protested. Indebitat. Assumpsit upon a general acceptance.
- XVI. All the Drawers are made liable; and whether the Party to whom the Money is made payable, is bound to procure an acceptance.
- XVII. Protest, what is meant by the same; and where the same is necessary, and where not. Protest upon the Stat. of 9 & 10 Wil. 3. cap. 17.
- XVIII. Bill drawn on two Persons, where the same is necessary, and where not.
- XIX. One Factor serves a Company, where a Bill accepted of his by one of the Company, obliges the rest, and where not.
- XX. What words amount to an acceptance, and what not.
- XXI. Where a Bill may be accepted for part, and what must be done with the Bill thereupon.
- XXII. When a Countermand may legally be made, and when not.
- XXIII. How the several Parties interested in a Bill of Exchange are obliged and fettered to each other.
- XXIV. How a collateral Security may be annexed to a Bill when the time is elapsed for non-payment.
- XXV. Where the Protest is only necessary to be kept, and where that and the Bill must both be remitted.
- XXVI. Bill lost, what is necessary for the Parties interested

in such case to act.

XXVII. Of blank Endorsements, the validity of the same.

XXVIII. A Bill once accepted, whether the same may be revoked; and whether it may be accepted to be paid at a longer time than is mentioned: And what Protests are then necessary to be made.

XXIX. Of Bills accepted for the honour of the Drawer, where the same shall oblige.

XXX. The time customary allowed for payment after failure of payment at the day.

XXXI. Of the Validity of speedy Protests in relation to recover the money to be paid on the Drawer.

XXXII. Bill accepted, and before the day of payment the Acceptor is a failing, what's necessary to be done in reference to the obtaining better Security.

XXXIII. Bills accepted for the

honour of the Drawer, where turned into an Act, and remitted by him that gives honour to the Bill.

XXXIV. The Acceptor ready to pay, but the Party to whom made payable is dead, what is necessary.

XXXV. Causes general for a Protest, and where satisfaction to the deliverer discharges all Parties.

XXXVI. Of Exchange by way of Credit.

XXXVII. One pays a Bill before it be due, and the Party to whom the same was paid, fails, where he shall be answerable to the Drawer notwithstanding.

XXXVIII. Of Bills assignable over according to the Customs of Merchants, what Operation in England.

XXXIX. Where an Averment is necessary of Defendant's being a Merchant.

I. THE Exchange for Monies is of great Antiquity as well by observation of the Hebrew Customs, as those of the Romans.

Upon the first of the Month *Adar*, Proclamation was made throughout all *Israel*, That the People should provide their half *Shekels*, which were yearly paid towards the Service of the Temple according to the Commandment of God, on the 25th of *Adar*, then they brought Tables in the Temple, (that is, into the outward Court Exod. 30, 34 Where the People stood) on these Tables lay the lesser Coyns which were to furnish those who wanted half *Shekels* for their Offerings, or that wanted lesser pieces of Money in their payment for Oxen, Sheep, Doves and the like, which stood there in a readiness in the same Court to be sold for Sacrifices; but this supply and furnishing the People from those Tables was not without an Exchange for other Money, or other things in lieu of Money, and that upon advantage: Hence all those that

*Moses Kotsen-
ses, printed at
Venice. An.
1557 de Sic-
lis. fol. 122.
Col. 2.*

that fate at the Tables were called chief *Bankers*, or *Masters of the Exchange*.

*Alex. Gen. dier.
lib. 5. cap. 30.*

II. By the *Romans* it is supposed to be in use upwards of 2000 Years, Monies being then elected out of the best of Metals to avoid the tedious Carriage of Merchandize from one Country to another: So other Nations imitating the *Jews* and *Romans*, erected Mints, and coined Monies, upon which the Exchange by Bills was devised, not only to avoid the danger and adventure, but also its troublesome and tedious Carriages.

III. Thus Kingdoms and Countries having by their Sovereign Authorities coyned Monies, caused them to appoint a certain Exchange for permutation of the various Coyns of several Countries, without any transportation of the Coyn, but giving *par pro pari* or *value for value*, with a certain allowance to be made those *Exchangers* for accomodating the Merchants.

*Reg. Orig. 194.
Statut. 5. R. 2.
cap. 2.
3 H. 7. 6.*

IV. As Commerce became various, so Exchange numerous; but generally reduced to four, *Cambio commune*, *Cambio real*, *Cambio siccè*, and *Cambio fictitio*, *Cambio commune*, in England was those that were constituted by the several Kings, who having received Monies in England, would remit by Exchange the like sum to be paid in another Kingdom. *Edward* the Third, to ascertain the Exchange, caused Tables to be set up in most of the general Marts or Ports of England, declaring the Values of all or most of the foreign Coyns of those Countries where his Subjects held Correspondence or Commerce, and what allowances were to be made for having Monies to be remitted to such Countries or Kingdoms.

*18 E. 3.
Aston Burnel.*

V. *Cambio real*, was when Monies were paid to the Exchanger, and Bills were drawn, without naming the species; but according to the value of the several Coyns, which two Officers afterwards were incorporated, and indeed was no more but upon payment of Monies here in England to be repaid the just value in Money in another Country, according to the price agreed upon between the Officer and Deliverer to allow or pay for the Exchange of the Money, and the loss of time.

VI. *Cambio siccè*, or dry Exchange, is when a Merchant

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Merchant hath occasion for 500*l.* for a certain time, and would willingly pay interest for the same; the Banker being desirous to take more than the Statute gives, and yet would avoid the same, offers the 500*l.* by Exchange for *Cales*, whereunto the Merchant agrees; but the Merchant having no Correspondence there, the Banker desires him to draw his Bill, to be paid at double or treble usance, at *Cales*, by *Robbin Hood*, or *John a-Nokes* (any feigned Person) at the price of Exchange then current; accordingly the Merchant makes the Bill, and then the Banker pays the Monies; which Bill the Banker remits to some Friend of his to get a Protest from *Cales* for non-acceptance, with the Exchange of the Money from *Cales* to *London*, all which with Costs, the Merchant is to repay to the Banker; sometimes they are so conscientious as not to make above 30 per Cent.

The usury was first introduced by the Jews here in England. Vid. Co. 2. Inst. fol. 506.

VII. *Cambio fictitio*, when a Merchant hath occasion for Goods to Freight out his Ship, but cannot well spare Money; the Owner of the Goods tells him he must have ready Money; the Buyer knowing his drift, it is agreed, That the Seller shall take up the Monies by exchange for *Venice*, or any other parts; but then the Merchant must pay for exchange, and re-exchange. So likewise where the Merchant is become indebted to the Banker, they are contented to stay, the Merchant paying exchange or re-exchange; the which he will most certainly compel him to do.

These two last ways of grinding the Face of the generous Merchant was afterwards prohibited, but notwithstanding it was found impossible to moderate the inequality of Exchanges, and to have value for value: So that at this day it seems to be a Cold that many an honest Man is apt to catch.

VIII. The just and true Exchange for Monies that is at this day used in *England*, (by Bills) is *par pro pari*, according to value for value; so as the *English* Exchange being grounded on the weight and fineness of our own Monies, and the weight and fineness of the Monies of each other Country, according to their several Standards proportionable in their valuation, which being truly and justly made, ascertains and reduces

duces the Price of Exchange to a sum certain for the Exchange of Monies to any Nation or Country whatsoever: As for instance,

If one receives 100*l.* in *London* to pay 100*l.* in *Exeter*; this by the *par*.

But if a Merchant receives 100*l.* in *London* to pay 100*l.* at *Paris*, there the Party is to examine and compare the *English* weight with the weight of *France*, the fineness of the *English* Sterling Standard with the fineness of the *French* Standard; if that at *Paris* and that at *London* differ not in proportion, then the exchange may run at one price, taking the Denomination according to the Valuation of the Monies of each Country; but if they differ, the price accordingly rises or falls: And the same is easily known by knowing and examining the real fineness of a *French* 5*s.* Piece and an *English* 5*s.* Piece, and the difference which is to be allowed for the want of fineness or weight, which is the exchange, and so proportionably for any summs of Monies of any other Country, the which is called *Par*, or giving value for value.

But this Course of Exchange* is of latter years abused, and now Monies are made a meer Merchandize, and does over-rule Commodities, and Monies rise and fall in price according to the plenty and scarcity of Money.

* And therefore some are of Opinion, that there can be no certain rate set on the *Par* in Exchange, to answer justly the value of the Coyms of Foreign parts, by reason of the diversity of them, and of their intrinsick values. Vide Sir Robert Cottons Posthuma, fol. 306.

IX. As Money is the common measure of things between Man and Man within the Realm, so is Exchange between Merchant and Merchant within and without the Realm; the which is properly made by Bills when Money is delivered simply here in *England*, and Bills received for the repayment of the same in some other Country, either within the Realm or without the Realm, at a price certain, and agreed upon between the Merchant and the Deliverer. For there is not at this Day any peculiar or proper Money to be found in *specie* whereupon Out-land Exchanges can be grounded; therefore all Foreign Coyms are called imaginary.

At

At London all Exchanges are made upon the pound Sterling of 20s. and 12d. to the Shilling; for Germany, Low-Countries, and other places of Traffick; and for France upon the French Crown: For Italy, Spain, and some other places, upon the Ducat: For Florence, Venice, and other places in the Streights, commonly by the Dollar and Florin.

Note, in an Action on the Case upon a Bill of Exchange, it was said in *Vernatti et Dubuffe's Case*, Special Bail is not required in a Writ of Error by the Stat. of 3. Jac. 1. cap. 8. because an Action upon the Case is not within that Stat. but only Actions of Debt; for had this been aided by 3 Jac. 1. there needed no provision by the Stat. of Car 2. 2 Keeb. 234. ^{2 Bulstr. 53, 54.}

X. Bills drawn to be paid, are either at sight, or at time certain, single, double or treble usance, and are commonly about three, for fear of any miscarriage. ^{15, 17 Can. 2. c. 8. §. 3.}

The taking and delivering Money at sight binds the taker up to give his Bill to pay at sight, or within some short time the like sum after such a rate the Pound, Dollar, Ducat or Crown, as is agreed between them in Foreign Coyn, either according to the valuation of Monies, or current Monies for Merchandize.

See what Action and how shall be brought for Guineas, foreign Coyn, in *Pope and S. Legers Case*, 1. *Lutwich* 484. 1. *Leon*. 41. *Wilshalge* against *Davidge*. 3 *Cro.* 536. *Bagshaw* against *Playn*. 2 *Cro.* 617. *Rands v.* 4 *Mod.* 409. *Peck. Latch*, 77, 84. *Wards Case*. ^{Guineas for 3 reign Coyns.}

XI. The second time of payment is called *Usance*; it is known or taken to be the compass of one Month, to be computed from the date of the Bill, and that governed according to the custom of the place where those Exchanges do run. For which Reason in an Action on a Bill of Exchange payable at *Usance*, the Plaintiff must shew what the *Usance* is. ^{Salk: 135.}

XII. The third is double or treble *Usance*, two or three Months: Sometimes there are Exchanges made upon half *Usance*.

The times of payment do alter the price of Exchanges according to time, commonly after 12, 15, or 20 in the Hundred by the year.

Usance from
London to { Middleborough
Amsterdam.
Antwerp
Bruges
Rotterdam
Lisle
Roan
Paris } are generally account-
ed one Months time
from the Date of the
Bill.

Usance from
Amsterdam to { Rome
Genoa
Venice
Naples
Palermo
Luca
Sevil
Lisbon } are generally account-
ed two Months from
the Date, &c.

From London
to { Florence
Venice
Leghorn
Zant
Aleppo
Luca } is sometimes account-
ed treble Usance from
the Date of the Bill.

The Bills
may have a
larger, some-
times a shor-
ter time,
there is no di-
rect certain-
ty, but only
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Usance is a
Month, dou-
ble Usance
two Months,
&c.

XIII. *Excambium vel Cambium*, or as the Civilians term it, *Permutatio*; *Billa Excambii* signifies no more but a customary Bill, solemnized by numerous consent of Traders, to have a respect more than other Bills, though of as high and as intrinsecal a value: And those that give such Bills are called *Exchangers* or *Bankers*.

Reg. Orig. fol.
194.
Statut. 5 R.
2. cap. 2.

Though the Act was no more but to keep up the life of Commerce, (without which it is impossible for any Nation to flourish) yet could not any Person draw such Bills, or return Money beyond Seas, without Licence first obtained of the King. But at this day any Man may do it without being obliged to obtain such leave.

XIV. Such a Bill being drawn, they commonly take one or two more of the same date word for word, only this Clause is inserted in the second, *My first of the same date, Persons and summs not being paid*: And in the

third

third, *My first and second of the same date, and contents not being paid.*

The right measure of judging on Bills of Exchange, is purely by the laudable Custom often reiterated over and over, by which means the same hath obtained the force of a Law, and not the bare and single Opinion of some half-fledg'd Merchants: For Bills of Exchange are things of great Moment as to Commerce, and are neither to be strained so high, as that a Man should not cast his eye on them, but the same shall be taken to be an *acceptance*: Nor on the other hand, having duly accepted them, the same should be rashly and unadvisedly avoided, by the shallow fancy of such nimble-pated shufflers; but they are soberly judged and governed, as the same hath generally been approved of and adjudged of in former Ages.

XV. A Bill being remitted, the Party is to go immediately to the Person to whom the same is directed, and present the same in order to his acceptance; if it be tendered, and the Party subscribes *Accepted*; or *Accepted by me A. B.* or being in the *Exchange* says, *I accept the Bill, and will pay it according to the Contents*; this amounts without all Controversie to an Acceptance.

But if the same be refused, the Party must then procure a *Protest*, and remit the same to the *Deliverer*, who is to resort to the *Drawer* for Satisfaction for the principal costs and damage.

Words are made to signify things; by the word *Deliverer* is

meant he that pays the Money beyond Sea. By the word *Drawer*, he that writes or draws the Bill of Exchange; the Person upon whom, is called the *Acceptor*.

The question whether a general *Indebitat.* *Assumpsit* will lie upon a bare acceptance of a Bill of Exchange, in the Argument of the Case of *Bellasis and Hester*. By Justice *John Pamel*, a general *Indebitat.* *Assumpsit* does not lie on a Bill of Exchange; but it ought to be a special Declaration upon the Custom of Merchants, as in the Case of *Brown and London*. 1 *Levins* 98. 1 *Mod.* 285. 2 *Keeble*. 695, 731, 758, 822. 1 *Vent.* 52. In which Case, Judgment was arrested after Verdict as reported by *Levins* and *Ventris*.

In the Case of *Bromwich and Lades*, it was said by the Chief Justice *Treby*, that Bills of Exchange were of such

such general Use and Benefit, that upon an *Indebitat. Assumpsit*, a Bill of Exchange may be given in Evidence to maintain the Action; and by Mr. Justice *Powel*, that upon a general *Indebitat. Assumpsit*, for Monies received to the use of the Plaintiff, such Bill may be left to the Jury to Determine, whether this was for value receiv'd or not. In this Case the Declaration was on the Custom of Merchants, and a general *Indebitat. Assumpsit* thereon. See the Declaration and Exceptions to it, of the said Case of *Bellasis and Hester*, in *Lutwich*, 1589.

By the Stat. of the 9th and 10th of *Will 3.* cap. 17. It is enacted that after the 24th of *June* 1698. All Bills of Exchange drawn in, or dated at, and from any Place of this Kingdom of the Sum of 5l. or upwards upon any Person in *London*, or any other Trading City, Town or Place (in which Bills, the value shall be expressed to be received) drawn payable at a certain time, after the Date thereof, may after acceptance in Writing, and the expiration of three Days after the same shall be due, be protested by a Notary Publick, or in default of such Notary Publick, by any other substantial Person of the Place before two Witnesses; refusal or neglect being first made of due Payment; which protest shall be made under a Copy of the Bill, in the form prescribed by the Act, and shall be notified within 14 Days after, to the Party from whom the Bills were received, who (upon producing such Protest) is to Repay the said Bills with Interest and Charges from the Proteſting; for which Protest there shall not be paid above 6d. And in Default of such Protest, or due notice thereof, the Person so failing shall be liable to all Costs, Damages and Interest thereupon. Provided that if any such Inland Bills be lost, or miscarry within the time limited for Payment of the same, the Drawer of the said Bills shall give other Bills of the same Tenor, Security being giving to Indemnifie him, in Case the said Bills so lost or miscarried be found again.

A Writ of Error was brought on a Judgment by *N. dicit* in an Action against the Drawer of an Inland Bill of Exchange; and it was objected; that since the Act of

§ 3. no Damages shall be recovered against the Drawer upon a Bill of Exchange without a Protest, and therefore the Action lies not, there being no protest.

But Holt Ch. J. The Statute never intended to destroy the Action for want of a Protest, but only to deprive the Party of recovering Interest and Costs upon an Inland Bill against the Drawer without Notice of non-payment by Protest; for before the Statute there was this Difference between foreign and Inland Bills of Exchange: If a Bill was foreign, one could not resort to the Drawer for Non-acceptance or Non-payment without a Protest, and reasonable Notice thereof; but in Case of an Inland Bill, there was no occasion for a Protest, but if any Prejudice happened to the Drawer by the Non-payment of the Drawee, and that for want of Notice of Non-payment, which he to whom the Bill is made ought to give, the Drawer was not liable; and the Word *Damages* in the Statute, was meant only of Damages that the Party is at by being longer out of his Money by the Non-Payment of the Drawee, than the Tenour of the Bill purported, and not of Damages for the Original Debt: And the Protest was order'd for the Benefit of the Drawer; for if any Damages accrue to the Drawer for want of Protest, they shall be born by him to whom the Bill is made; and if no Damages accrue to him, then there is no Harm done him, and a Protest is only to give formal Notice that the Bill is not accepted, or accepted and not paid; and if in such Case the Damage amount to the Value of the Bill, there shall be no Recovery, but otherwise he ought not to lose his Debt; but that ought either to appear by Evidence upon *Non assumpsit*, or by special pleading; and the Act is very obscurely and doubtfully penn'd, and we ought not by Construction upon such an Act to take away Man's Right. And the Judgment was affirmed *per totam Curiam*.

What Actions lie upon a Bill of Exchange, and how to be brought, and against whom, See *Hardress* 487. *Scaccario*, and *Brown* and *London's Case*, 1 *Mod.* 85 1 *Levins* 298. and 2 *Keeble* 695. and the Case *Cramlington* against *Evans* and *Percival*, 2 *Vent.* 67.

XVI. If there be several *Drawers* who subscribe, all are liable in case of a Protest.

Nor is any such thing as a three days respite to be allowed for acceptance.

If a Bill is drawn upon a Merchant in *London* payable to *J. S.* at double *Ufance*, *J. S.* is not bound in strictness of Law to procure an acceptance, but only tender the Bill when the Money is due: But Merchants who generally have generous Spirits, will not surprize a Man, but first procure an acceptance, or at least leave the Bill for the party to consider and give his answer, and then give advice of the same, and if the Money be not paid, then Protest.

XVII. A Protest is no more but to subject the *Drawer* to answer in case of non-acceptance, or non-payment; nor does the same discharge the party *Acceptor*, if once accepted; for the Deliverer hath now two Remedies, one against the *Drawer*, and the other against the *Acceptor*.

To entitle the Party to an Action at Law in *England* against the *Acceptor*, it matters not whether there be a Protest; but to entitle the Party to a recovery against the *Drawer* beyond the Seas or elsewhere, there must be a Protest before a Publick Notary.

If a Merchant hath accepted a Bill, and before the same becomes to be due, he proves insolvent, or at least his Credit is publicly blasted, a Protest ought to go.

If a Merchant to whom the Bill is payable, be Absent, sick or like to die, any Friend or Servant of his may cause a Protest to be made.

2 Keb. 584.

A. draws a Bill upon *B.* to the use of *C.* and upon non-payment, *C.* protests the Bill, he cannot Sue *A.* unless he gives notice that the Bill is protested, for *A.* may have Effects of *B.* in his Hands, by which he may satisfy himself, 1 Vent. 45.

By the Statute 3, 4 *A. c.* 9. It is enacted, that if the Party on whom an Inland Bill of Exchange shall be drawn, shall refuse to accept the same by underwriting it, the Party to whom the same is made payable may and shall cause such Bill to be protested for Non-acceptance.

No Acceptance of such Inland Bill of Exchange shall be sufficient to charge any Person, unless the same be under

underwritten or indorsed in Writing thereupon; and if such Bill be not accepted by such underwriting or Indorsement, no Drawer shall be liable to pay any Costs, Damages or Interest thereon, unless such Protest be made for non-acceptance thereof, and within fourteen Days after such Protest, the same be sent, or Notice thereof be given to the Party from whom such Bill was received or left in writing at the place of his usual abode.

If such Bill be accepted and not paid before the Expiration of three Days after the same shall become due, then no Drawer shall be compellable to pay any Costs, Damages or Interest thereon, unless a protest be made and sent or Notice thereof be given in manner above-mentioned: Nevertheless, every Drawer shall be liable to pay Costs, Damages and Interest if a protest be made for non-acceptance or non-payment and Notice thereof be sent, given, or left as aforesaid.

Such protest is not necessary unless the Value be acknowledged in such Bill to be received, and unless the Bill be drawn for 20*l.* or upwards.

If any Person accepts such Inland Bill of Exchange in Satisfaction of a former Debt, the same shall be esteemed a compleat Payment of such Debt, if the Person accepting such Bill for his Debt doth not take his due Course to obtain Payment thereof by endeavouring to get the same accepted and paid, and make his protest as aforesaid.

XVIII. A Bill drawn on two jointly must have a joint acceptance, otherwise it must be protested; but to two or either of them, *é contra.*

*Per Fasonem
in lege allegan-
tur ff. de con-
ditio ab. inde-
biti.*

Then if the same be accepted by one, it is pursuant to the tenour of the Bill, and ought not to be protested but in case of non-payment; and in that case the Person Acceptor is liable to an Action, but if it be on joint Traders, an acceptance by one will conclude and bind the other. *Salk. 126.*

XIX. A Factor of the *Hamborough, Turkey, or India* Company draws a Bill on the same, and a Member accepts the same, this perhaps may make him liable, but not another Member.

So it is if ten Merchants shall employ a Factor at the *Canaries*, and the Factor draws a Bill on them all, and

one of them accepts the Bill, and then refuses payment; this will not oblige the rest.

Winch. 24, 25. But if there be three joint Traders for the common
Salk. 126. stock and benefit of all three, and their Factor draws a Bill on them, the acceptance of the one will oblige the residue of the Company.

XX. A small matter amounts to an acceptance, so that there be right understanding between both Parties: As *Leave your Bill with me, and I will accept it; Or, Call for it to morrow, and it shall be accepted;* that does oblige as effectually by the Custom of Merchants, and according to Law, as if the Party had actually subscribed or signed it, (which is usually done.)

But if a Man shall say, *Leave your Bill with me, I will look over my Accounts and Books between the Drawer and I, and call to Morrow, and accordingly the Bill shall be accepted,* this shall amount to a compleat Acceptance: For this mention of his Book and Accounts was really intended to see if there were effects in his hands to answer, without which perhaps he would not accept of the same. And so it was Rul'd by the Lord Chief Justice *Hales at Guild-Hall.*

A Bill may be accepted for part, for that the Party upon whom the same was drawn, had no more Effects in his hands; which being usually done, there must be a Protest, if not for the whole sum, yet at least for the residue: However, after payment of such part there must be a Protest for the remainder.

Triq. 20. Car.
2. in B. R.

The receiving
of part of the
Monies upon
the Bill, does
no ways weaken the Bills.

Per leg. publi-
in si ff. depofi-
ti & per Bart.
ibidem. & per
Romanum sin-
gulari, fol.
474.

Before the time of payment of the Bill, the Party may notwithstanding accept it, and pay it at the time of payment; or another may accept the Bill for the Honour of the Drawer, and if he pay it in default of the Party, yet before payment he is bound to make a Protest, with a Declaration that he hath paid the same for the Honour of the *Drawer*, whereby to receive his Money again.

XXII. Any time before the Money becomes due, the Drawer may countermand the payment, although the Bill hath been accepted.

The Countermand is usually made before a Notary; but if it comes without, so it comes under the Parties hand, it is well enough.

If the Bill be accepted, and the Party desires to have the Money before it be due, and it is paid, and then there comes a countermand; it hath been conceived that it ought not to be allowed; for as he could not enlarge the time, so he could not shorten it, but his Duty is to follow his Order.

XXIII. *Note*, The Drawer is bound to the Deliverer, and the Acceptor to the Party to whom the Bill is made payable; yet both are not bound to one Man, unless the Deliverer be a Servant to the Party to whom the Money is made payable; or the Party to whom the Money is made payable be Servant to the Deliverer: Yet both Taker and Acceptor are liable till the Bill is paid.

Assumpsit, and declares on the Custom of London, that if any Merchant or other Person Merchandizing in London, make a Note in Writing under his Hand, and by this promiseth to pay any Sum of Money to a Person in it named, or to the Bearer; and if the Person in the Note named, to whom by the Note it was promised to be paid, Assign or deliver it to another Person for to receive the Money to his own use, and he carries this to the Drawer of the Note, and requests him to pay the Money to him, then the Person that made the Note, was chargeable to pay this to the Bearer. That the Defendant (being a Goldsmith) made such a Note, by it promising to pay a 100*l.* to *W. B.* or the Bearer; and that *W. B.* delivered the Note to the Plaintiff to receive the Money to his own use, in satisfaction of 100*l.* due to him by the said *W. B.* and that the Plaintiff carried it, and shewed it to the Defendant and requested him to pay the 100*l.* which he had not done; by which by the Custom he became chargeable, and so promised to pay. After Verdict for the Plaintiff, it was moved in Arrest of Judgement; that this Custom to pay to the Bearer was too general: For perhaps the Goldsmith before notice by the Bearer had paid it to *W. B.* himself, as in truth he had; and of such Opinion was the Court, *Horton vers. Cogs*, 3. *Levins* 299. where see the Pleadings.

Bill payable to the Bearer. *Salk.* 125.

(a) If the Plaintiff recover against the Drawer of a Bill who he has no Execution upon it) he shall not afterwards.

(a) This Judgment was reversed in the Exchequer Chamber, because the Recovery, without Execution, was no Satisfaction. *Lutw.* 878, 882, b.

wards recover against any of the Endorsers. See the Case at large, *Claxton and Swift* 3. Mod. 86.

Styles, Pasch

Ann 1 54, in

B. R. fol. 370.

XXIV. Therefore when you bring your Action, be sure to draw your Declaration accordingly, and make the same part of the Custom as you set it forth; for if you vary, you must expect to be nonsuited: And the Party is not bound to alledge a particular place of Demand.

If a Bill be returned protested for want of payment, the Drawer is to repay the Money and damage, or else he may procure a Security, which is no more but another Person of value subscribes the Bill, in these and the like words, *I here underwritten to bind myself as Principal, according to the Custom of Merchants, for the sum mentioned in the Bill of Exchange whereupon this Protest is made, Dated, &c.*

Now the Drawer, by virtue of this supplemental Agreement, hath as much time again to pay Monies as there was given him in the Bill when it was first drawn; so that if the Money be not paid, together with the Rechange and Charges of the Party, the Party may recover the same on the Principal or Security.

* That is for not payment, the Bill being once accepted.

XXV. Beyond the Seas the Protest * under the Notary's hand is sufficient to shew in Court, without producing the very Bill it self. But if a Bill in England be accepted, and a special Action grounded on the Custom be brought against the Acceptor, at the Tryal the Party Plaintiff must produce the Bill accepted, and not the Protest; otherwise he will fail in his Action at that time.

Therefore it is safe that a Bill once accepted be kept and only a Protest for non-payment be remitted; but a Bill protested for not acceptance must be remitted.

XXVI. If a Bill is left with a Merchant to accept and he loses the Bill, (or at least it is so mislaid, that it cannot be found) the party shall request the Merchant to give him a Note for the payment according to the time limited in the Bill of Exchange; otherwise there must be two Protests, one for not acceptance the other for non-payment: But if a Note is given for payment, and there happens to be a failure, yet in that case there must be a Protest for non-payment.

XXVII

XXVII A Bill is remitted to *J. S.* who owes Monies to *J. D.* *J. S.* delivers the Bill to *J. D.* and on the back-side subscribes his Name; if *J. D.* receives the Monies, he may fill up the blank as if the Monies had been actually paid to *J. S.* This is practised amongst Merchants, and by them reputed firm and good. But certainly the *Common Law* looks upon this filling up of blanks after a Man hath once signed or sealed, to be no better than a harmless forgery; but if there be either a general or special Authority to the purpose, it may then alter the Law.

By the Opinion of my Lord Hales Hill. 28. Car. B. R. at Guild-Hall.

Note, No Person, be it Wife or Servant, can accept of a Bill of Exchange to bind the Master without a lawful Authority, as a Letter of Attorney, and the like, which must be underhand, unless that it has been formerly and usually done by the Wife or Servant in such case, when the Master hath been out of Town, who hath approved of the same and answered payment: It must be usually done; but one Partner may for another.

Styles Reports in B. R. fol. 307.

A Servant of Sir Robert Clayton, and Mr. Alderman Morris, (but at that time actually gone from them) took up 200 Guineas of Mr. Monck a Goldsmith, without any Authority of his Masters; (but Monck did not know that he was gone) the Monies not being paid, Monck brought an Action against Sir Robert Clayton and Morris, and at Guild Hall it was Rul'd per Keeling Chief Justice, That they should answer; and there was a Verdict for the Plaintiff. And though there were great endeavours to obtain a new Tryal, yet it was denied, the Court at Westminster being fully satisfied that they ought to answer: For this Servant had used often to receive and pay Monies for them; and thereupon they actually paid the Monies.

Monck versus Clayton Melit. Mich. 22 Car. 2. in B. R.

Note. That which will oblige the Master, will be the authority and Liberty which he usually gives the Servant; therefore such a power devolved, ought to be secured by the prudentest way that may be: Which is generally done by Bonds and Obligations.

And though the same seems an Act of wisdom for Merchants and others so to take, yet it

often times proves the destruction of many a Family. The Father puts out the Son perhaps with no less than 2 or 300 l. and is himself become bound for his Truth and just Accounting, &c. The Servant is immediately trusted with his Cash, and then he too young to be experienced in the World, either neglects keeping a just Ac-

If a Bill of Exchange by contrary Wind or other occasions be so long on the way, that the Ufance or time limited by the Bill be expired, and being tendred, both acceptance and payment are denied; Protests for both must be made, and the Drawer must answer the value, rechange and damage.

Rastal fol.

339.

*Bald in rubr.
de constit. pe-
cunia in ult.
Col. & leg.
quidem ff. eo-
dem Col. pe-
mults*

XXVIII. A Bill once accepted, cannot be revoked by the Party that accepted it, though immediately after and before the Bill becomes due, he hath advice the Drawer is broke.

If a Bill is not accepted to be paid at the exact time, it must be protested; but if accepted for a longer time, the Party to whom the Bill is made payable, must protest the same for want of acceptance according to the tenour; yet he may take the acceptance offered notwithstanding. Nor can the Party if he once subscribes the Bill for a longer time, revoke the same, or blot out his Name, although it is not according to the tenour of the Bill; for by his acceptance he hath made himself debtor, and owns the draught made by his Friend upon him, whose Right another Man cannot give away, and therefore cannot refuse or discharge the acceptance.

Note, This Case will admit of two Protests, perhaps three.

*Bald. in leg pro
debit C. de bon.
affor. Jud possi-
der. & per.*

1. One Protest must be made for not accepting according to the time.
2. For that the Money, being demanded according

count, or keeping that, subjects his Master's Cash to be spent by himself and those who make it their sole Trade to betray such Youths. The Master finding the Consumption, calls his Servant to account, who conscious of the Act, forsakes his Service dares not see his Relations, and then as a general consequence falls into Company, the which nothing but Providence can preserve from taking their wicked courses. The Father is called to answer, whatever the Master does say the Servant, hath spent or imbezeled, none being able to contradict him; he must with a heart full of grief submit to pay, besides the loss of the Monies advanced upon the Servant's first putting forth: VVhich sometimes proves a great affliction in a Family. On the other side, if Servants were not to be intrusted, the Mystery could not be learnt, nor the Business dispatched; and therefore faith must be given: But then it were justice and honesty that as a Father puts perhaps the Child of his love to one in whom he reposes a faith and trust, that the Master should be then as a Parent, so they should prevent all occasions that might subject them to temptations, and not be over-hasty in trusting them with the Cash VVhich is the very Bait our London Gamesters catch such Gudgeons with.

to the time mentioned in the Bill, was not paid.

3. If the Money is not paid according to that time that the Acceptor subscribed or accepted.

Bartol. in leg. singul. Col. 7. ff. probatur.

A Bill was drawn payable the first of *January*, the Person upon whom the Bill was drawn accepts the Bill to be paid the first of *March*, the Servant brings back the Bill: The Master perceiving this enlarged acceptance, strikes out the first of *March*, and puts in the first of *January*, and then sends the Bill to be paid, the Acceptor then refuses: Whereupon the Person to whom the Monies were to be paid, strikes out the first of *January*, and puts in the first of *March* again: In an Action brought on this Bill, the question was, Whether these alterations did not destroy the Bill? and Rul'd it did not.

Per L. C. J. Pemberton, inter Price & Shute, Pasch. 33. ar. 2. in B. R.

A. draws a Bill on B. and B. is in the Country; C. a Friend of his hearing of the Bill accepts it: The Party to whom the Money is to be paid, must make a protest for non-acceptance by B. and then he may take the acceptance of C. and it shall bind C. to answer the Money.

If a Bill is drawn on B. and B. happens to be in the Country, and a Friend of his desires the Party not to protest, and he will pay the same, it is good, and shall bind such Party.

Pinchard's vers. Fowk, Styles, fol. 416.

If there be two joint Merchants or Partners, and one of them accepts a Bill of Exchange, the same shall bind the other; and an Action of the Case on the Custom may be maintained against him.

Salk. 126.

XXX. Merchants generally allow three days after a Bill becomes due for the payment; and for non-payment within three days protest is made, but is not sent away till the next Post after the time of payment is expired.

London.

If *Saturday* is the third day, no protest is made till *Munday*.

Holland.

XXXI. The use of the Protest is this, That it signifies to the Drawer that the Party upon whom he drew his Bill was unwilling, not to be found, or insolvent, and to let him have a timely notice of the same, and to enable the Party to recover against the Drawer, for if one draws a Bill from *France* upon a Person in *England*, who accepts and fails, or becomes insolvent at the time of payment, if there be not a Protest and

There are two Protests:
1. For non-acceptance, which is called Intimation
2. For non-payment.

* timely

* Which is
looked upon
to be the
third day.

* timely notice sent to the Drawer there, it will be difficult to recover the Money.

In *Holland* they are not altogether so strict, yet there must be a reasonable time of notice; the reason is, for perhaps if he had reasonable and timely notice, the Drawer then might have had effects, or other means of his upon whom he drew, to reimburse himself the Bill, which since for want of timely notice he hath remitted or lost. And the general Rule is, That though the Drawer is bound to the Deliverer till the Bill is satisfied, yet it is with this Proviso, that Protest be made

There is no danger, be the Party never so responsible, to protest immediately if the money be not paid when it is due, *i. e.* the third day, but there may (especially beyond Seas) be great hazard for want of protesting.

used for the obtaining payment of the Monies; for it were unreasonable the Drawer should suffer through his neglect.

XXXII. Where a Merchant hath accepted, and before the same became due, he becomes insolvent, or at least his Credit publicly blasted, a Protest ought to go; but then there is usually a demand made, which once coming, the Drawer, is compellable to give better Security; and if a second Bill comes, if no Protest, then Drawer and Security lie at stake.

*In leg. pro de-
bito in fine C.
de bon. author.
Judic. possiden.*

If a Bill of Exchange be paid before it is due unto one that breaketh afterwards, he shall be compelled to pay it again unto the Deliverer of the Money, within what time it is payable.

Brunettie's case

XXXIII. If a Merchant draws a Bill, and there is a Protest for non-payment; if another Person hearing of the same, declare, that he for the honour of the Drawer will pay the contents, and thereupon subscribes, he is obliged thereby; and in this case it has been practised, that that Party that received the Money hath put his Name on the back-side of the Bill in blank; but the Receipt is sometimes taken on the Protest, which together with the whole proceeding is turned into an Act, and the same being drawn by the Notary, is remitted to the Drawer by him who gave honour to the Bill.

XXXIV

XXXIV. If a Bill be accepted, and the Party dies, yet there must be a demand made of his Executors or Administrators; and in default or delay of payment, a Protest must be made: And although it may fall out, that the Monies may become due before there can be Administrators, or the Probate of the Will be granted; yet that is delay sufficient for a Protest in case of non-payment.

Fourteen days allowed from the death before Administration can be committed, unless there be a Will.

But on the other hand, if the Party be dead to whom the Monies are made payable, and the Monies are ready to be paid, and there is no Person that can legally give a Discharge, yet a Protest ought not to go for not payment; The reason is, because there is no Person that hath any Authority either in Deed or in Law to make it, and a Notary ought not to make it; if he does, and the Party hath received any prejudice thereby, an Action of the Case perhaps may lie against him for his pains: Nor does it avail, that if Security be offered to save him harmless against the Executors or Administrators, for that is an Act left to his own Discretion; for perhaps the Security may not be lik'd: But whether good or bad, makes nothing as to oblige him in Law.

But an Intimation ought to go, and that the Acceptor is willing to pay according to Order.

But if a Man is bound in a Bond to pay a sum of Money to J. S. his Executors, Administrators, &c. and the Obligee dies intestate the day before the sum becomes due, yet the Bond is not forfeited if not paid at the day, because there was no body to whom the Obligor could pay to save his Obligation: But as Littleton says, *If it be to pay to J. S. generally, you must hunt him out all over the Kingdom, if you'll save the Penalty.*

XXXV. A Man not found, or being found, not met withal either at home or the Exchange, is cause sufficient for a Protest; but in that there must be diligence used in the finding him.

A Bill returned protested for non-payment being once satisfied by the Drawer to the Deliverer, the Drawer is discharged, and so is the Acceptor to him to whom the Monies were to be paid: But the Acceptor, by virtue of his acceptance, makes him Debtor according to the Custom of Merchants to the Drawer.

XXXVI. Monies may be had on Exchange by way of

of Letters of Credit, the which are in two respects; the first general; the other special.

The general Letter is open, directed, *To all Merchants and others that shall furnish my Servant or Factor, or any other with such and such Monies*; for repayment of which he binds himself to answer and pay all such Bills of Exchange as shall be drawn on him upon the receipt of the value, by his Servant, Factor, or other Person. If there be really Monies advanced on this Letter of Credit, and paid to the Factor, Servant or other, and Bills of Exchange are sent to the Party that sent such Letter of Credit, and if he refuses to accept, yet according to the custom of Merchants he is bound to pay: The reason is, for that there was no respect had to the Ability of the taker up, but to him that gave his Letters of Credit: And therefore in such case if an Action at Law be brought, the particular custom as to that point must be carefully set forth.

The special Letters of Credit, where one writes a Letter to furnish another Mans Factor or Agent; there is in this the same remedy as above.

As Bills of Exchange seldom come without Letters of Advice, so ought they to be pursued: If a Bill shall express, *And put it to the Account of A*; and the Letter of Advice says *B*; this must be protested against, for it cannot safely be paid, at least running the risque of an equitable Suit.

XXXVII. If one pays Money on a Bill before it be due, and the Party breaks, it has been conceived that the Party ought to answer the Drawer: The reason hath been, because the Drawer might have countermanded the same, or ordered the Bill to be made payable to another.

In Italy if Money is paid to a Bankers Servant, and if the Master subscribe, *Pagate com fi dice*, this binds the Master as effectually as if he had subscribed it with his own hands.

XXXVIII. A Bill drawn by a Merchant in London payable by another Person beyond Seas, such Bills in most Countries are assignable over from Merchant to Merchant, and the last Person may sue and recover the same upon an acceptance: But in England only the first

first Person mentioned in the Bill, and to whom the Money is made payable may recover. 'Tis true, such Person to whom the Money is made payable may for valuable consideration deliver this Bill to another Person, and he may endorse an Order on the back-side; and if the Party afterwards refuses payment of the same, it may be sued in the Parties Name to whom the same was transferred, laying the same by way of Custom.

It is enacted by 3, 4 A. c. 9. That all Notes payable to any Person or Order shall be assignable over in the same manner as Inland Bills of Exchange are or may be, and that any Person to whom such Note is endorsed, may maintain an Action for the Money, either against the Person who signed such Note or against any of the Persons, who endorsed the same, in like manner as in Cases of Inland Bills of Exchange.

XXXIX. In an Action on the Case grounded upon the Custom of Merchants, that whenever any such or other Person negotiating for them, with any other Merchant in England have Bills directed to them, that if he to whom such Bills are directed refuse to accept on sight, or to pay such Bills, then he that drew it ought, both being by the Custom to be Merchants, the Bearer as well as the Drawer. And the Plaintiff not having shewed that the Bearer was such a Merchant or Person negotiating, it was moved to stay Judgment for that Cause; but Judgment was given for the Plaintiff, for by the Court such Merchant, is referred only to him, to whom the Bill is directed, and to the Procurers of such a Bill, and not to the Drawers, or they whose use the Money is to be paid, *Edgar vers. Chute. Keeble. 592, 636.*

See where an Averment is necessary of the Defendant's being a Merchant on such Action upon the Custom of Merchants, 2 Cro. 306. *Case vers. Taylor.* and 1 Cro. 301. *Reginal vers. Rigalt.*

In an Action on the Case on an Inland Bill of Exchange *Salk 125.* brought by the Endorser against the Drawer it was objected, that there was no Averment of the Defendant's being a Merchant; but it was answered and resolved by the Court, that the Drawing of the Bill was a sufficient Merchandizing and negotiating to this purpose. C H.

C H A P. XI.

Of Monies advanced by way of Bottomery, or
Fœnus Nauticum.

- I. *How Commerce is made equivalent to natural Community.*
 II. *Whether Money be fit only to maintain the Trade and Credit of Vice.*
 III. *Whether Abraham chose to acquire a Property by Money.*
 IV. *Of the natural and Instrumental measure of the value of things.*
 V. *How Money is equal to all things.*
 VI. *Money is for buying, and hinders not, but helps Permutation.*
 VII. *Money the Instrument of Charity and Sacrifices as well as our Necessities.*
 VIII. *Of the difference between Monies advanced to be used in Commerce at Land, and that which is advanced at Sea.*
 IX. *Of Monies advanced by way of Bottomery when the Contract hath its inception.*
 X. *Of Monies sent on Ship board, and the Vessel is wreck'd, where the Lender shall bear share of the loss, and where not.*
 XI. *Of Monies taken up by the Master, where the same shall oblige the Owners, and where not.*
 XII. *The derivation and institution of this sort of Loan, and for what causes.*
 XIII. *Of the several ways of taking up of Monies by way of Bottomery, real and feigned.*
 XIV. *Monies so advanced, whether gain ought to be bounded, or otherwise left to the will of the Lender.*
 XV. *Of Usura Marina, how reasonable the same stands at this day.*
 XVI. *Of Monies advanced to a considerable profit called Usufruit, being both honest and honourable.*

I. **M**oney is one of those things which they who want, want all other things but words to reproach their bad Fortune. But sometimes it is policy even of Rags and Poverty it self to undervalue that which it cannot have, and to convert that which it hath (though never so mean) into an esteem; and then to lodge as much pride in a Tub, as *Alexander* could in a Palace, though it could not tempt him to a change of condition.

*Nil habet infelix paupertas durius in se,
Quàm quod ridiculos homines facit —*

No wonder therefore, seeing Rich Men will be obstinate to hold their advantages, that deformed Poverty, (which mixes with them in the same frame as a shadow to set off their colours the better) would have the Rich to descend to them; and that instead of setting out Monies by way of *Bottomery*, *Usury*, and the like, they would not have any such thing as Money at all, but would have all things reduced into a state, as is before mentioned.*

* *Lib. I cap.*

1. §. 1, 2, 3.

It cannot be denied, but that we all live by the natural or intrinsic value of things; but the way to come by them is by an Instrument of civil value, which is Money; instead of Community therefore we now have Commerce: Which *Commercium* is nothing else but *Communio mercium*; but Communion must needs be by the means of another thing that may bear equal proportion on both sides, which is Money only. But now let us hear, and if possible, satisfy the Complaints that are made against it so impatiently.

Where there is great Luxury, there must be likewise great Industry to maintain it; and therefore the Industry of this Civil State must be greater than that which is in the simple State of Nature: But what is there here to blame, seeing Industry, no more than Plenty, is in it self a Sin?

*Ascham de Nat.**Monet. cap. 6.*

II. It is the Answer of Envy or Ignorance, *Prima peregrinos obscœna pecunia mores---intulit---* Money is that (say they) which maintains the Trade and Credit of Vice, if that were taken away, we should look after nothing but necessaries which are vertuous; it makes too nice inequalities and distances, and is not significant enough in the best things: For all the Money in the World is not really worth one penny Loaf, which is convertible into our Natures and Substances; it serves only to assure Fortune, but not Vertue; it is accepted as the measure of all things Natural, Moral, and Divine: For Honour is nothing but ancient Riches†,† and in Morals, *Virtus post nummos*; this in Religion breeds that root of all Evil, Covetousness: For in a simple state of Nature necessary things must needs be spent within a short time, and the return of the Sun brings a new Supply and a Treasure greater than the Indies; of

† *Arist. Polit.*

* *Campanella* of which One * makes this Observation, That it was got
Monarch. Hisp. in Blood, sails home in a Sea of Blood, and never rests till it
 be laid out in Blood. This was that which was made the
 price of Salvation, even of the Blood of our Blessed Sa-
 viour, thirty Pieces for that which was worth Thirty
 thousand Worlds; but in the Religion of the first Times,
Nulla violatus Jupiter auro, as *Juvenal* hath it.

And if this had not been brought into the World,
 we should not have so much to discount for at the day
 of Judgment. Why therefore should that which is con-
 demned to the obscurity of the Earth, and lodged so
 near Hell, now be made the price of all that which is
 above the Earth, even *a Solo usque ad celum*? Or why
 should we be excluded from the Gifts of Nature, un-
 less we have those of Fortune? Is it not then more
 reasonable that rich Men lose this Instrument of Lux-
 ury, than the Poor should lose the necessary means of
 their Subsistence? This is the Plea which is made in
forma Pauperis, & de ipsa Paupertate.

Most certain it is, that neither the stupid simplicity
 of the Woods, nor Poverty it self are any part of Vir-
 tue; and therefore are not reckoned Blessings, as Ri-
 ches were to *Solomon*, (he who built God's first Tem-
 ple, and put his Religion in lustre) and as they like-
 wise were to *Numa*, from whom Money was called
Nummus; He likewise built the first Temple at *Rome*,
 and kindled first the Vestal fire, & *ferocem populum deo-
 rum metu mitigavit*.

III. We know how God conversed with *Abraham*,
 who was the first that had Money, and made use of it
 to buy a Property: It is true, they with whom he in-
 habited called him a Prince; but that was no Argu-
 ment to him to disown their Properties, but for the
 contrary, lest they should think that Dominion or a
 Right to things was founded in Grace.

IV. But to come more close to the Question, and to
 examine the reason and necessity of this measure; Mo-
 ney is like a Law or Government, which are all con-
 stituted by the same extreme necessity; therefore the
 counterfeiting or attempting to destroy any of these
 by private means, is every where Treason. Now this
 measure is two-fold, either Natural or Civil, or rather
 Natural

Natural, and the Instrument which expresses, the natural by equal Permutation: The natural measure is proportioned either by *Want*, or *Plenty*. In *Want* we consider whether the thing be useful or necessary; things which are necessary are best, but of least price; as a Loaf of Bread is more necessary, but infinitely cheaper than a Diamond. One Man hath Clothes, another Leather; those two possibly have no need one of another, and therefore there will be no Permutation betwixt them; but if one had need of another, then he who were more prest. would come to the price of the other: And therefore *Want* or *Plenty* is the measure of estimating things, and is the Bond of Society, whereby one Man shews he is or may be useful to another; and Nature hath so ordered it, that no Man is so rich who hath not some need of the Poor; and no Man is so mean and abject, but he may be some ways useful to the Rich.

V. The Civil measure, or rather Instrument, where the Natural expresses it self, is *Money*, which hath a feigned value, and therefore it is sometimes higher and lower in esteem as Men please; which could not be, if its value were natural which is unalterable. I have Cloth at such a price, and you have Wines at the same price, then we regarding the same price, may make an equal Permutation: Or if I give to you many pieces of Gold for your Cloth at the same price, the sale is equal again; whether it be an inconvenience that in some Countries * it is sometimes at * *Poland*, and higher value than at another, is not a consideration of this Discourse; for the price of things themselves change more than any Money doth daily.

Money is like the middle term of a Syllogism, of which it is said, *Qua conveniunt in tercie conveniunt inter se.*

* *Poland*, and generally in most of those Northern Countries.

VI. *Money* is an invention only for the more expedite permutation of things; but it doth not follow that Men may not make any permutations but by *Money*, even as well now as if we were in our natural state; if they who dig now in waste Hills have their harvest of Beans well gathered in, but had need of fine for the Stomachs sake, or of Drugs for Healths sake; if the Vintner, or Apothecary have no need of Beans, what use will they make of the natural value of their Beans without *Money*? Or if need be, what could they do till their Beans are gathered? *Money*

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therefore

therefore hinders not Permutation and Commerce of natural things, but assist them; nay it is therefore an Instrument of Instruments; for he who hath Money may buy things which he need not use, but sell, thereby to get other things afterwards for his use. There is no Nation or People so barbarous, but have Money or a publick Instrument of Permutation either in Metals or in Fish bones, &c. for it imports not much of what matter it is, provided it be durable, not counterfeitable, and difficult to come by.

VII. Take away this fungible Instrument from the service of our necessities, and how shall we exercise our Charity, which is a branch of Religion and Justice, as well as of Humanity? He who goes to Church passeth as it were through two Temples, the Poor at the Porch, and the Temple it self: And the giving at the Porch is called Sacrifice, Offering, and Gift, as well as that at the Altar. God would be Sacrificed to only in one Town of the World, *Jerusalem*: But could that have been, if Money and Money-changers had not been allowed? How could they who came from such remote places have by any other means brought their Oxen, Calves, Goats and Doves to the Altar? If there were nothing further to shew, but that one piece which our Saviour himself Coyned miraculously in the mouth of a Fish, it were Argument sufficient that the use of Money may be both good, just, and necessary.

Vide Chap. of Exchange. §. 1.

VIII. Things being thus stated, and that Money is both good, just, and necessary, it will be demanded loudly, That admitting a reasonable advantage may be made by way of Usury, *quo jure* is it that an advantage upon the same more than what the Law allows, is taken?

Leg. 3. D. de Naut. fœn. lib. 1. eod. l. 62. D. de rei. Vindic. Iccinius, lib. 2. cap. 4. §. 2.

The distinction is great between Monies lent to be used in Commerce at Land, and that which is advanced to Sea. In the first, the Laws of the Realm have set marks to govern the same, whereby the avaricious mind is limited to a reasonable profit: The reason of that is because the Lender runs none, but the Borrower all the hazard whatever that Money brings forth. But Money lent to Sea, or that which

is called *Pecunia* * *trajeſtitia*, there the ſame is advanced on the hazard of the Lender, to carry (as is ſuppoſed) over Sea; ſo that if the Ship periſhes, or a Spoilation of all happens, the Lender ſhares in the Loſs without any Hopes of ever receiving his Monies; and therefore is called ſometimes *Uſura Marina*, as well as *Fœnus Nauticum*, the advantage accruing to the Owners from their Money, ariſing not from the Loan, but from the hazard which the Lender runs; the which is commonly reduced to a time certain, or one or more Voyages, according to their ſeveral and reſpective agreements.

IX. If the Bonds be ſealed, and the Money is advanced, if the Ship happens to miſcarry by Storm, Fire, Enemy, or any otherwiſe before the Voyage begun, then the Borrower runs the riſque, unleſs be otherwiſe provided generally, as that if ſuch a Ship ſhall not arrive at ſuch a place at ſuch a time, &c. there the Contract hath its inception from the ſealing; but if the Condition be, That if ſuch a Ship ſhall ſail from *London* to *Amſterdam*, and ſhall not arrive there, &c. then, &c. there the contingency begins not till the departure. Yet it has been conceived, That if the Maſter takes up Money accordingly and buys in a lawful Lading, but will happen to endeavour to defraud the Prince or State of their Cuſtoms, and put ſuch Goods on Board by means whereof he has incurred a Forfeiture of his Ship; in ſuch Caſe the Lender is not obliged to ſuch hazard.

X. If Money be lent on Ship-board by a Merchant for Cargo or Paſſenger, and before the day of payment the Ship happens to be wreckt or caſt away; if there ſuch a Saver as will admit a Contribution then the Party is not to have his whole Money, but is to come to the Averidge: But if the time of payment were paſt before the Miſfortune happened, then the Lender muſt be repaid his whole Money free from Contribution.

And therefore by the Laws Marine, if the Borrower detains any ſuch lent Monies beyond the term appointed for the repaying, he ſhall at his Return not

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only

* Leg. Fœn.
Naut. Leg.
periculi eod.
Lex Mercan.
122.

Vide paſſim ad
leg de Fœr.
Naut & D D.
leg. Naval,
Rhod.

Vide leg. 3. C.
de Fœn. Naut.

Leg. Naval.
Artic. 17.

Artic. 18.

only pay the profit agreed on before the Voyage, but also augment the same according to the time that hath accrued since the day of payment.

XI. A Master of a Ship hath no power to take up Money by *Bottomery*, in places where his Owner or Owners dwell, unless it were for so much only as his part comes to in the said Ship: Otherwise he

* *Testatur Vinus in Peckium ad L. L. Nautic. quem vide pag. 95. Leg. Oleronc. l. 1. Leg. 4. D. de Naut. fan l. 1. C. eod. Leg. qui Roma §. Calimachus de verb. obl & ibi Gothfr. & alios.*

(a) *Hob. 12. Mo 918. Noy 95. Latch. 252.*

Salk. 34.

Lex Merc.

102 122

(b) *Salk 33. 2*

Mod. Case. 79.

16 Car. 2 cap. 6. §. 12.

A good Law,

and ought to

be encoura-

ged; it's pity

it was not

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* and his Estate must stand liable to answer the same. (a) But when a Master is out of the Country, and where he hath no Owners, nor any Goods of theirs nor of his own, and cannot find means to take up by Exchange or otherwise, and that for want of Money the Voyage might be retarded or overthrown, Monies may be taken up upon *Bottomery*, and all the Owners are liable thereunto; otherwise he shall bear the loss that is, the Owners are liable by their Vessel, though the Money is not so employed in truth; and the Owners have their remedy against him whom they put in trust. (b) But the Persons of the Owners are roway made liable by the act of the Master for Monies taken up.

If Owners agree not in setting out the Ship, most Voices shall carry it, and then Money may be taken up for their part by *Bottomery*, or *Fœnus Nauticum*, or by *Hypothecating* such a proportion of the Ship.

Many Masters of Ships having Ensured or taken up Monies upon *Bottomery* to greater Sums of Money than the value of their Adventure, do willfully cast away, burn, or otherwise destroy the Ships under their charge, the same was made Felony, and the Person and Person so willfully doing or procuring the same to be done were to suffer Death.

XII. The Signification of this *Fœnus Nauticum*, by the Dutch called *Bomerie*, *Bodmerie*, *Boddemerii*, variously pronounced from the Keel * or Bottom of the Ship upon the Parallel, whereof the Rudder of a Ship doth govern and direct the same; *parte pro to sumpta, ita primum appellata, cum etiam lingua Gallorum antiqua & Britannica Bodo vel Bodum fundum profundum signet † in quem navis fundum, vel ipsam rem ejusq; usum mutuo accepta est pecunia, sed postea latine pro fanore nautice etiam usurpari cepit.* And the Money

* *Joh. Locin. lib. 2. c. 4. § 1. Latche's Rep. fol. 252. Scarborough's Case † Teste Cambrenia, p. m. 149. Locinius lib. 2. cap. 4. §. 1.*

so taken up by the Master is done upon great extremity, and that for the compleating of the Voyage when they are in distress and want in some Foreign parts; and indeed such taking up is indeed in the nature of Mortgaging the Ship, *for le Neif oblige al payment de ceo &c.* And in the Instrument there is a Clause that expresses that the Ship is engaged for the performance of the same.

Monies that are advanced are upon two Securities, the one is on the bare Ship, the other upon the Person of the Borrower, sometimes upon both; The first is where a Man takes up Monies and obliges himself, that if such a Ship shall arrive at such a Port, then to repay (perhaps) double the sum lent; but if the Ship happens to miscarry, then nothing.

This Money is likewise called *pecunia trajeditia*, because that upon the Lenders Danger or Adventure, it is carried beyond or over the Seas, so that if the Ship perish or all be spoiled, the Lender does lose his whole Money Lent; But on the contrary, Money Lent at Interest, is delivered at the Peril of the Borrower, and the profit of this is meerly the price of the simple Loan, and is called *Usura*. But the profit of the other, is a Reward for the Danger and Adventure of the Sea, which the Lender takes upon him during the Loan, which is to be understood until the Voyage be ended. *Lex Mercat.* 122. *Sea Law*, 206, 207.

Difference between this and other Loans as interest.

The forms of Bills of Bottomery, Laws of the Sea, 580, to 584. Appendix to the same 13, 14, 15.

Bills of Bottomery.

XIII. So likewise some will take up Monies, the condition reciting, *Whereas there is such a Ship*, naming her, bound to Amsterdam, *whereof such a Man is Master*, (whereas indeed there is no such Ship or Master in nature) *that if that Ship shall not arrive at such a place within twelve months, the Money agreed on to be paid, shall be paid; but if the Ship shall arrive, then nothing.* The first of these is honourable and just according to the laudable practice among Marine Persons, and though the advantage

is high, as 20, 30, nay sometimes 40 per Cent. without consideration of time; (for the Monies are to be paid within so many days after the Ship's safe arrival;)

Toto tit. dig. & Cod. de Naut. seu & Doctorum sic Hardus

arrival;) yet in regard the Adventure is born by the Lender, for (if the Ship perishes, the Advancer loses,) the Laws and Practice of all Maritime Countries allow of the same. And therefore by the Com-

Trajectitia pecunia propter periculum creditoris quamdiuturne *mon Law*, if an Action of Debt be brought on such an Instrument, the Defendant cannot plead the Statute of *Usury*. And so it was adjudged where one *Sharpley* had brought an Action of Debt on a Bond for Monies taken up upon *Bottomery*: The Defendant pleads the Statute of *Usury*, and shewed that a certain Ship called the *_____* made a Voyage to fish observed by *in New found-land*, (which Voyage might be performed in eight Months) and the Plaintiff delivered 50*l.* to the Defendant to pay 60*l.* at the return of the Ship to *D.* and if the said Ship by Leakage or Tempest should not return from *New found-land* to *D.* then the Defendant should pay the principal Money; and if the Ship never returned, then nothing to be paid. Upon * Demurrer it was adjudged the same was not *Usury*: For if the Ship had staid at *New found-land* two or three years, yet at her return but 60*l.* was to be paid, and if she never returned, then nothing.

*Verum enimvero hic proprie non versari, damnatum fore, sed compensationem aliquam periculi, quod creditor contra naturam mutui in se recepit partem. Johannes Locinius, lib. 2. cap. 4. §. 1, & 2. * Trin. 6. Jac. in B. R. 2 Cro. 208. Sharpley versus Hayroll. 1 Levins 54. Sayer & Gleane, & 1 Sid. 27. Cro. Jac. 508. 1 Keb. 711.*

The other advance which is upon a fictitious supposition of a Ship and Master, wherein indeed there is no such in nature, is more unconscionable, the same being the common practice that's used amongst the *Italians*, and now on this side the Water, though the same is as to internal Right unjust, yet it is daily practised, and it was not long since adjudged † that such Contract was good, according to the *Common Law* of this Realm, and that on a special Verdict.

XIV. Most certain it is that the greater the danger is, if there be a real Adventure, the greater may the profit be of the Monies advanced: And so hath the same been the Opinion of Civilians, and likewise some

some Divines; though some seem to be of opinion, That any profit or advantage ought not to be made of Monies so lent, no more than of those that are advanced on simple loan, and on the peril of the borrower. However, all or most of the Trading Nations of Christendom do at this day allow of the same, as a matter most reasonable, by reason of the contingency or hazard that the Lender runs; and therefore such Monies may be advanced several ways, and a profit may arise so, that there runs a peril on the Lender.

a real venture. Cl. Salmasius, cap. 9. de modo usur. fol. 380, 188, 218. Trajæditia pecunia propter periculum creditoris, quamdiu navigat navis, infinitas usuras capere protest. Upon which place Anianus observes, Quia maris periculo committitur in quantas convenerit usuras hanc pecuniam dare creditor potest. Vide Novel. Const. 106, 110.

There is likewise a second way of advancing Monies called *Usura Marina*, joining the advanced Monies and the danger of the Sea together; and this is obliging sometimes upon the Borrower's Ship, Goods and Person: The product of which by agreement will advance sometime 20, 30, and sometimes 40 per Cent. As for instance, A private Gentleman has 1000 l. ready Money lying by him, and he has notice of an ingenious Merchant that has good Credit beyond Seas, and understands his Business fully, applies himself to him, and offers him a 1000 l. to be laid out in such Commodities as the Merchant shall think convenient for that Port or Country the Borrower designs for, and that he will bear the Adventure of that Money during all that Voyage; (which he knows may be accomplished within a year) hereupon the Contract is agreed upon, 6 per Cent. is accounted for the Interest, and 12 per Cent. for the Adventure outwards, and 12 per Cent. for the Goods homeward; so that upon the return the Lender receives 30 per Cent. which amounts to 1300 l. The Lender in this case hath a good bargain, no question. Now let us see what advantage the Borrower hath.

1. The Borrower prevents the taking up the like sum at Interest, which comes to 6 per Cent. and Brokerage, which comes now in this Age, through the

Vide Carolum Molinæum de usur. q. 3. n. 92. ait hoc approbat, omnes Theologi ut creator possit a quid accipere ultra sorbem pro susceptione periculi. But surely that must be upon

Usura legitima ejus qui trajæditiam pecuniam trans mare vehendam facit, id est cum periculo suo, centesima est,

generosity of the Merchant; and covetousness of the Scrivener, at 1 or 2 *per Cent.* more; and then the same is let out but for six Months, and then the Scrivener inevitably at the six Months end sends his Note, that his Friend expects his Monies to be paid in; so that to stop that gap there must be Continuation, which is at least one *per Cent.* more, besides the obliging of Friends in Securities.

2. The *Assurance* is prevented, which perhaps may come to between 5 and 20 *per Cent.* according as the Times are; and common prudence will never suffer a Merchant to venture two parts of three parts of his Estate in one Bottom without assuring.

3. As he shall not have occasion to Ensure, so it may be a great occasion of preventing the common Obligation of his Ensuring of others: The which in a generous Merchant in Honour cannot be denied the *Premio* running reasonable.

4. It prevents the Parties running the Risque and danger of the Seas, Enemies, or any other fatal loss, and hath been a means to introduce a Man's Credit in a short time at a lesser charge, if not to put him in a condition not to be beholden to such a fair, though chargeable means.

And this cannot be *Usury* by the Laws of this Realm, for the Risque and Danger that the Lender runs.

In the East-India, and some other Companies.

XV. There is also another way, but that is both honest and honourable, called *Usufruit*, that is a Stock in a Company or Society which is perpetual; such a Stock or Portion may be purchased, that is, the advantage or benefit arising by the improvement of the same.

As for instance, The *East-India* Company hath a Stock lodged in their hands by divers Persons, which they in the most prudent manner as they see fit, employ to such places as they judge most proper; if a Return is made, the advantage of that is distributed to each Person that is any way intitled to that Stock. Which

Book II.

Which advantage is called a *Dividend*, and perhaps may afford some 20 or 30 per Cent. But on the other hand, if that proportion of the Stock which goes out happens to miscarry, the abatement is proportionable, and so the Stock may be lessened, unless that they will stay the *Dividends* to keep up the Stock; the which they may do; For it is a *Trust* reposed of so many *Mens Monies* in their Hands, to yield them such Advantage as they shall upon a just account set out: So that if a Man hath 1000 l. Stock, he cannot take the same out of the Great Stock whereby to lessen the same, but he may transfer that *usufruit* by that Customary way which they have to any other Person, for a valuable consideration in *infinitum*. Such a Stock of 1000 l. in the *East-India* Company in time of War might have been purchased for 80 l. *Nett*; but now in time of Peace scarce got under 170, or 180 l. the *Dividends* running high.

C H A P. XII.

Of Impositions called Great Customs, Petty Customs, and Subsidies.

Impositions, whether they may be commanded without the Three Estates, and of *Magna Charta* touching the same.

I. Of Impositions made voluntary by consent of Merchants, and of the adnul of the same.

II. Of the Confirmation of the Great Charter for free Traffick; and of the Settlement now made on His Majesty of the same.

III. Of the Immunities formerly of the *Hanſiatick* Towns here in England, and when determined.

IV. Of the Antiquity of Customers or Publicans as well in

former Ages as at this present time, in most Nations.

VI. Of the Imposition called *Magna Custuma*.

VII. Of that which is called *Parva Custuma* payable by Strangers, and the Act called commonly *Charta Mercatoria*.

VIII. Of Subsidy, and of what, and the Rates how set.

IX. Of Subsidy by Strangers on Wines.

X. Of Goods not rated how to pay.

XI. Of the Subsidy Duty for Clothes.

THAT Impositions neither in the time of War or other the greatest necessity or occasion that may be (much less in the time of Peace) neither upon

upon Foreign nor inland Commodities of what nature soever, be they never so superfluous or unnecessary, neither upon Merchants, Strangers, nor Denizens, may be laid by the King's absolute Power without Assent of Parliament, be it never so short a time.

By the Statute of *Magna Charta*, Chap. 30. the words are, *All Merchants*, if they were not openly prohibited before, shall have their safe and sure Conducts, to enter and depart, to go and tarry in the Realm, as well by Land as by Water, to buy and sell without any Evil Tolls, by the Old and Rightful Customs (except in time of War) and if they be of the Land making War against Us, and be found in our Realm at the beginning of the War, they shall be attached without harm of Body or Goods, until it be known to Us or Our Justices how Our Merchants be intreated there in the Land making War against Us. The Statute of which this is a branch, is the most ancient Statute Law we have, won and sealed with the Blood of our Ancestors, and so reverend in former times, that it hath been twenty nine times solemnly confirmed in Parliament.

Customs, Subsidies, Tolls, Excises, Imposts, and other Duties upon Commodities Imported or Exported are due to the particular Princes or States, by the general Law of Nations, as a matter Inherent to their Prerogatives, as they are the absolute Commanders, Proprietors, and Maintainers of the Harbours, Havens, and Ports, where the Commodities are Exported or Imported: And all Merchants are Bound to take notice thereof, and observe the same, according to the Feudal Laws, Constitutions and Proceedings therein used in all Countreys respectively, whereby they are secured and defended in their Trade, and Traffick. Or otherwise in Breach of not observing such Laws and Constitutions, they are in danger of Mults, Fines, Loss and Forfeitures, of their Goods and Commodities. To give an exact account of the Nature, Antiquity, several sorts of Customs, Subsidies, Imposts, and other Duties relating to Merchants would take up too large a compass for this Treatise.

Book II.

wise, therefore shall refer as to the nature of them to the several Books of my Lord Cook, in his 2 *Instit.* upon the Stat. of *Magna Charta*, Cap. 30. And other Statutes and Books which are many on this Subject.

II. *Impositions* were in some sort done *Consensu Mercatorum*, by *Edward* the First, and *Edward* the Third: 3 *Ed.* 3 *Rot. Claus.* And again in *Henry* the Eighth, of which the House of *Burgundy* complained, as against the Treaty of *Entercourse*. 29 *Ed.* 1. *Ex. tract. Bruxel-les.*

King *Henry* the Third finding that such a *Modus* of imposition tended to the destruction of Trade, and apparent overthrow of Commerce, and was against the Great Charter, made Proclamation *Anno* 16. in all Ports of *England*, That all Merchants might come *faci-* *Dors. Claus. an*
undo rectas & debitas consuetudines, nec sibi timeant de malis 16 *Hen.* 3. n. 20.
pollis, for that such Impositions had no better name than *Moltols*.

The like was declared and done by *Edward* the First in the twenty fifth year of his Reign, and *Edward* the Second, in the eleventh and twelfth years of his Reign. *Rot. Claus.* 11 *Ed.* 2.

And though the King cannot lay any Imposition on Merchant or Merchandize without Assent in Parliament, yet the King by his Prerogative may restrain them from Trading (if not from any Christian Foreign Prince) yet from any Infidel Realm, State, or People without his Royal Licence: And the reason of this is, for that by such Commerce it might give occasion for the relinquishment of the Catholick Faith, and an opportunity to adhere to Infidelism; and therefore generally in *Edward* the Third's Time, Licenses were frequently granted with this Preamble, That the King having special trust and confidence that the Party would not decline from his Faith, did license him, &c. In the seventh of King *James*'s time this very matter came in question, upon License granted to a Merchant to Trade to the *East-Indies*. *Vide Lane's Report in Bate's Case, this matter there debated Mitchel bourn and Mitchel-bourn's Case. C. B. Brownlow's 2. part, fol. 296.*

III. In 2 *Ed.* 3. the Great Charter for Free Trade was Confirmed; and about some three years after there were Commissions granted for the raising a new kind of Tallage, but the People complained;

12 Ed. 3.
Memb. 22. in
dors. Rot. Al-
maigne.

ed; whereupon the Commissions were repealed, and he promised never to assess any but as in the time of his Ancestors.

The Parlia-
ment having
justly, honour-
ably and vo-
luntarily hum-
bly present-
ed such and
many more
who are esta-
blished on his

But this Prerogative Power of Imposing inward and outward upon Commodities over and above the ancient Custom of Subsidy without a free consent in Parliament, is now ceased and settled; and that question which for many Ages had been handled by the most Learned of their times, in the asserting and in the denying, will never more be remembered, the same being now establish'd by Act of Parliament. Which being managed for some time, was afterwards farmed out. The like having been done by former Kings, as did *Edward* the Third with the * New and Old Customs of *London* for 1000 Marks monthly to be paid unto the Wardrobe.

according to their several limitations.

* Claus. Anno. 5

Ed. 3. Orig. 17

Ed. 3 Rot. 2.

Richard the Second, Anno 20. Farmed out the Subsidy of Cloth in divers Counties.

Vide the great
Case in Mich.
4 Jac. in the
Exchequer
versus Bates.
Lane's Rep.
fol. 22.

So *Edward* the Fourth, *Henry* the Eighth, *Queen Elizabeth*, and King *James*; the same having been used in former Ages even in the best governed State *Rome*, which let out Portions and Decim's to the Publicans.

The Old Hanse Towns. viz. *Lubeck*, *Collen*, *Brunswick*, *Dantzick*, and the rest, had extraordinary Immunities granted unto them by our Third *Henry*, for their great assistance and furnishing him in his War and Naval Expeditions with so many Ships; and they pretended, the King was not only to pay them for the Service of their Ships, but for the Vessels themselves in case they miscarried: The King having concluded a Peace, and they being on their return home for *Germany*, the most considerable part of their Fleet miscarried by storm and stress of weather; for which (according to Covenant) they demanded reparation. The good King in lieu of that which he wanted, Money, granted them divers Immunities; and amongst others, they were to pay

but 1 per Cent. Custom, which continued till Queen Mary's time, and by the Advice of King Philip she enhanced the 1 to 20 per Cent. the *Hans* not only complained, but clamoured aloud for breach of their Ancient Privileges confirmed unto them by long Prescription from thirteen successive Kings of England, and the which they pretended to have purchased with their Money. King Philip undertook to accommodate the business, but Queen Mary dying, and he retiring, nothing was effected. Complaints being afterwards made to Queen Elizabeth, she answered, *That as she would not innovate any thing, so she would protect them still in the Immunities and Condition she found.* Hereupon their Navigation and Traffick was suspended a while, which proved very advantageous to the *English*, for they tryed what they could do themselves herein; their adventures and returns proving successful, they took the whole Trade into their own hands, and so divided themselves to Staplers and Merchant-adventurers; the one residing constant at one place, the other keeping their course, and adventuring to other Towns and States abroad with Cloth and other Manufactures. This so nettled the *Hans*, that they devised all the ways that a discontented People could to draw upon our new *Staplers* or *Adventurers* the ill Opinion of other Nations and States: But that proving but of too small a force to stop the Current of so strong a Trade as they had got footing into, they resorted to some other; whereupon they applied themselves to the Emperor, as being a Body incorporated to the Empire: And upon complaint obtained Ambassadors to the Queen to mediate the business: But they returned *ill re infecta*. Hereupon the Queen caused a Proclamation to be published, *That the Merchants of the Hans should be intreated, and used as all other Strangers within her Dominions in point of Commerce, without any mark of distinction.*

This inflamed them more, whereupon they bent their Forces more eagerly, and in an Imperial Diet, at Ratisbone they procured that the *English* Merchants, who had associated themselves in Corporations both

in *Emdden* and other places, should be adjudged *Monopolists*; whereupon there was a Comitial Edict procured against them that they should be exterminated, and banished out of all parts of the Empire; which was done by *Suderman* a great Civilian. There was there at that time for the Queen as nimble a Man as *Suderman*, and he had the Chancellor of *Emdden* to second him, yet they could not stop the Edict, whereby our new erected Society of Adventurers were pronounced a Monopoly: Yet *Gilpin* played his Cards so well, that he prevailed the Imperial Ban should not be published till after the Diet; and that in the interim his Imperial Majesty should send an Ambassador to *England* to advertise the Queen of such proceedings against her Merchants. But this made so little impression on the Queen, that the Ban grew rather ridiculous than formidable, for the Town of *Emdden* harboured our Merchants notwithstanding, and afterwards the Town of *Stode*; but the *Hanfiatics* pursuing their revenge, and they being not so able to protect them against the Imperial Ban, removed and settled themselves in *Hamburg*.

This Politick Princess, in recompence of their revenge, commanded another Proclamation to be published, ' That the *Hanfiatick* Merchants should be allowed to Trade into *England* upon the same Conditions as they formerly did, provided the *English* Merchants might have the same Privileges to reside and trade peaceably in *Stode* or *Hamburg*, or any where else within the Precincts of the *Hans*. This so incensed and nettled them, that all endeavours were made to cut off *Stode* and *Hamburg* from being Members of the *Hans*, or of the Empire: But the Design was suspended till they saw the success of 88, King *Philip* having promised to do them some good Offices in the Concern.

But the Queen finding that the *Hans* were not contented with that Equality she had offered to make betwixt them and her own Subjects, but were using such extraordinary means, put forth another Proclamation, ' That they should transport neither

' Corn,

Corn, Victuals, Arms, Timber, Masts, Cables, Metals, or any other Materials or Men to *Spain*, or *Portugal*. And not long after the Queen growing more redoubted and famous by the Overthrow of King *Philip's* Invincible Armado, (as the Pope christened it) the *Hans* began to despair of doing any good, especially they having about some 60 Sail of their Ships taken about the River *Lisbon* by her Majesties Frigats, that were laden with *Ropas de contrabanda*. She notwithstanding had thoughts of discharging this Fleet by endeavouring a reconciliation of the difference: But she having intelligence of an Extraordinary Assembly at *Lubeck*, which had purposely met to consult of means to be revenged of her, she thereupon made absolute Prize of those 60 Sail, only two were freed to carry home the sad Tidings of their Brethrens misfortune. Hereupon the *Pole* sent a ranting Ambassador in the behalf of the *Hans*, who spake of the Injuries done to the *Hans* in a high tone. But the Queen her self suddenly answered him in a higher, with a satisfaction no greater than what she had done to others of the like quality before.

This fortunate Clashing for the 19 per Cent. on the Customs, has proved ever since advantageous for *England*, our Merchants have ever since beaten a peaceful and an uninterrupted Trade into *High* and *Low Germany*; and by their constant Trade in those parts have found a way thorow the *White Sea* to *Arch-Angel* and *Mosco*. The return of all which hath since vastly increased the *Riches* and *Strength* of this Nation.

V. After the *Jews* became Tributary to *Rome*, *Joseph. locutus* which was acquired by *Pompey* three score years before the Birth of our Saviour) certain Officers or Commissioners were appointed by the *Romans* in all those places where their Victorious Standards had obtained a Conquest, who used to appoint such Officers or Commissioners to collect and gather up such custom money or Tribute as was exacted by the Senate. Those that gathered up these Publick payments were termed *Publicani*, *Publicans*, and by reason

de Pompeio. l. i. de Bello Jud. c. 5. p. 720.

son of their cruel and oppressive Exaction, they became hateful in all Nations.

* *Sigon. de An-
tiq. Jur. Civ.
Rom. l. 2. c. 4.
Luke 13. 2.*

Every Province has its several Society or Company of Publicans; * every Society its distinct Governour: In which respect it is that *Zacheus* is called by the Evangelists, *Principes Publicanorum*, the chief Receiver of the Tribute, or chief Publican: And all the Provincial Governours in these several Societies had one chief Master or Superintendant residing at *Rome*, unto whom the other subordinate Governours gave up their Accounts. These Publicans were hated of all the *Roman* Provinces, but especially of the *Jews*, because though it was chiefly maintained by the *Galileans*, yet it was generally inclined unto by the *Jews*. That Tribute ought not to be

*If. Causabon,
Exercit. 3. 37.*

paid by them. This Hatred is confirmed by the Rabinnical Proverb, *Take not a Wife out of that Family wherein there is a Publican, for such are all Publicans*. Yea, a faithful Publican was so rare at *Rome* it self, that one *Sabinus*, for his honest managing of that Office, in an honourable remembrance thereof, had certain Images with this Inscription, *καλῶς πλωύσαντι* For the faithful Publican. No marvel that in Holy Writ Publicans and Sinners go hand in hand.

*Sueton. in Flav.
Vesp. cap. 1.*

But now the World has been so long used to them that in all or most Nations the particular Princes or States chuse out the most Sage and Prudent Men for that Employment: And certainly the Customs of this Realm never did return to that great and clear Account as they have done under the care and prudent management of the present Commissioners: And were *Tertullian* alive, he would have recanted that Opinion of his, *That none would be a Publican but a Heathen*.

*Tertullian
(printed
1609.) de pu-
dic. cap. 9.*

VI. Customs are Duties certain and perpetual payable to the King as the Inheritance of his Crown for Merchandizes transported from and beyond the Seas from one Realm to another. *Magna Custuma antiqua* is payable out of Native Commodities, scilicet, Wooll, Wooll-fells, and Hides, and that is certainly imposed.

Ar

And this Custom which is called *Magna Custuma*, is due to the King of common Right for four Causes.

1. For leave to depart the Kingdom, and to carry Commodities of the Realm out of it.
2. For the Interest and Dominion which the King hath in the Sea, and the Arms thereof.
3. Because the King is the Guardian of all the Ports within the Realm, & *Custos totius Regni*.
4. For Wharfage and Protection of Merchants upon the Seas against the Enemies of the Realm, and Pirates.

VII. The Custom which is called *Parva Custuma*, ^{1 Eliz. Dyer, fol. 165.} is a Custom or Duty payable by Merchants, Strangers, and begun in the time of King Edward the first, when they granted him, that they would pay him and his Heirs 3d. in the Pound for all Merchandizes Exported and Imported by them, &c. and that the Charter was, and may be of great Use, have here inserted the same, as it was faithfully transcribed out of the Roll in the Tower.

Upon an Information for not paying of Custom for Linnen Cloth, the Case was thus: The Defendants were Born within the Realm, their Father being an Alien, but their Mother was Born here, the question was, whether the Defendants should pay Aliens Custom or not? Because the Attorney General said that Directions were lately given in *Scaccario*, that the Issue of Aliens for the first Generation, should pay Aliens Duties; but here the Defendant's Mother was *English*, and the Court gave Liberty to find it specially; but the Plaintiff would not insist upon it, because some part of the Goods were clearly forfeited, for not paying any Custom at all, or making any offer to pay it, save only Post-entry after Seizure, and a Month lacking Days after the first Entry of the Quantity and Parts at the Custom-House. And a Verdict passed for the Plaintiff for that part only, *Hardress*. 355, 336. ^{Goods conveyed to several Ports shall not pay Custom twice.} If Goods are Landed, and the Custom paid at one Port, and afterwards the Goods are conveyed cross Land or by Sea, to another Port, Customs shall be paid for them at the Second Port and that

this is not within the Stat. of 3 H. 7. Cap. 7. *Brue* vers. *Roe*. 1 Sid. 264.

Bancks had seized Cambricks and Hollands because they were landed at *Dover* without paying Customs and it was afterwards agreed, that the Owner should pay the Custom and have his Goods again, and so was done; whereupon an Information was brought against *Banks* for the Goods on the Statute 3 H. 7. and he pleaded not guilty, and gave in Evidence that the Goods were enter'd in the Custom-House Book. But *per Curiam*, that was no discharge of him for the Mischief; for then when Goods are forfeited, every body will redeem them by paying Customs. And therefore the Goods being once forfeited shall be the King's without Redemption, and the Officer not discharged by delivering 'em over, as in *Trove*.

Compositions
with the Far-
mers for the
forfeiture.

The Plaintiffs were Farmers of the King of his Customs, and the Defendants brought into Port a Ship with Goods and unladed, the Customs not paid: After they compounded with the King for the Forfeiture, (which the Farmers had not in their Grant) after the Farmers brought Debt against them for the Custom of 12 d. per pound. The Defendants pleaded this matter in bar; and upon Demurrer Judgment *Quer.* for this reason, because the 12 d. in the Port became a Duty by bringing the Goods into the Haven, and a Chattel vested. By *Tanfield*, this Custom is due, when a Ship is brought within an Haven with intent to Unlade there, but not when they are cast over-board by Tempest. *Salter* and *Garrard* against *Malapert*. 1 *Rolls Rep.* 383.

Duty for Salt
taken as
Prize.

Salt taken from a *Spaniard* by a *Dutchman*, by Commission from *Scotland*, and brought into *Scotland*, and from thence into *England*, the Duty shall be paid as *Scotch* Salt: But if it had been taken by *English* Commission, and only put into *Scotland*, it should pass as *English* or foreign Salt, within the meaning of Statutes of the 12 Car. 2. cap. 18. Sect. 16. and Car. 2. cap. 11. Sect. 38. — against *Jaggard*. 3 *Ke* 510.

to Mercatoribus Ali-
nigenis de Libertati-
bus eis concessis.

*For Merchant Strangers
concerning Liberties
granted to them.*

EX, Archiepisc. &c
Salutem. Circa bo-
m statum omnium
mercatorum & blscripte-
m Regnorum, Cerra-
m, & Provinciarum, vi-
liet, Alemann. Franciæ,
spaniæ, Portugaliæ, Na-
r. Lombardiæ, Tusciæ,
venciæ, Cataloniæ; Du-
us nostri. Aquitann.
lofan. Tatureini, Flandr.
bant, & omnium alia-
m terrarum, & locorum
aneorum quocunque
ine censeantur, veni-
um in Regnum nos-
m Angliæ, & ibidem
mercantium.

THE KING, to his ^{31 Ed. I. num}
Archbishops, &c. ^{44. infus.}
sendeth Greeting. Con-
cerning the good Condi-
tion of all the Merchants
of the Kingdoms, Lands,
and Provinces under-writ-
ten: That is to say, Ger-
many, France, Spain, Portu-
gal, Navarr, Lombardy, Tuf-
cany, Provence, Catalonia;
Our Dukedoms of Aqui-
tain, Tholouse, Turein, Flan-
ders, Brabant, and all other
Lands, and Foreign Pla-
ces by what Name soever
called, coming into Our
Kingdom of England, and
there remaining.

osiprecipua cura soli-
t. qualiter sub nostro
mo tranquillitatis, &
e securitatis, immu-
eisdem Mercatoli-
futuris temporibus
aretur: At itaque
iporum reddantur
stra, & Regni nostri
cia promptiora; ip-
Petitionibus fa-
litter annuentes, &
atu eorumdem pleni-
curando, in forma
equitur ordinantes
cripta, dictis Merca-
s pro nobis & here-
nostris in perpetu-
ritur concedenda.

We being very solici-
tous out of Our special
Care, that under Our
Dominion, a Freedom of
Tranquillity, and full se-
curity for the said Mer-
chants may be provided
for the future, so as they
may the more readily ap-
ply themselves to the Ser-
vice of Us, and of our
Kingdom, We graciously
answering their Petitions,
and ordaining more amply
for securing their Condi-
tion in form following
under-written, are pleased
to grant to the said Mer-
chants for us, and our Heirs
for ever.

Imprimis, That is to say,
That all Merchants of the
said Kingdoms and Lands,
may come from any other
place safe and secure under
our Tuition and Protecti-
on into our said Kingdom
of *England*, and every
where within our Domi-
nion, with their Mer-
chandizes of what sort
soever, and be unmole-
sted and quiet concerning
* *Murage*, † *Pontage*, and
‖ *Pavage*, and that with-
in Our said Kingdom and
Dominion, they may Traf-
fick in the Cities, Bo-
roughs, and Market-
Towns, only in gross, as
well with Natives or In-
habitants of this Our
Kingdom and Dominion
aforesaid, as with Stran-
gers, Foreign and Dome-
stic: But so, as their
Wares vulgarly called
Mercery, or the *SPECIES*
thereof, they may sell by
Retail, as formerly hath
been accustomed. And
that all the said Merchants
may carry, or cause to be
carried, whether they
please, their Merchandize
which they have brought
into Our said Kingdom
and Dominion, or other-
wise acquired, except to
the Lands of the manifest
and notorious Enemies
of Our Kingdom, paying

* *Repairing*
publick Walls.

† *Bridges.*

‖ *Pavements.*

Imprimis, *Uellicet*
quod omnes Mercatorum
victorum Regnorum
Terrarum talium & secum
sub tuitione & protectione
nostra in totum Regnum
nostrum Angliae, & ubi
infra potestatem nostram
alibi veniant cum
mercandis suis quibuscumque,
de Muragio, Pontage
& Pavagio, liberi & quieti
quodque infra idem Regnum
& Potestatem nostram, in
Civitatibus, Burghis, & Villis
mercatoris possint mercari
duntaxat, in grosso, & cum
Indigentis seu incolis ejusdem Regni
Potestatis nostre prout
quam cum Alienigenis
transiis vel privatis, tamen
quod. Mercatorum
vulgariter Merceriae
cantur ac Species, mihi
atim vendi possint, prout
antea fieri consuevit, quod
omnes predictas mercatores
Merchandisas quas ipsos ad
prout Regnum & Potestatem
nostram adducere seu infra
idem Regnum & Potestatem
nostram adducere, vel alias
ad re contigerit, possint
voluerint tam infra idem
Regnum & Potestatem
nostram predictam quam
extra ducere, seu portare
cetera praterquam ad
manifestorum & no-

num hostium Regni nostri
solvendo consuetudines
quas debebunt, Vinis dun-
taxat exceptis, que de eo-
dem Regno seu Potes-
tate nostra, postq iam in-
tra idem Regnum, seu
Potestatem nostrum duc-
ta fuerint, sine voluntate
nostra & licentia speciali,
non liceat eis educere
in quo modo.

Item, Quod predicti
Mercatoris, in Civita-
tibus Burgis predictis
pro voluntate sua hospi-
tari valeant, & morari
illis ac cum bonis suis,
ad gratiam ipsorum qui-
bus fuerint hospitia libe-
re domus.

Item, Quod quilibet
contractus per ipsos Mer-
catores cum quibuscun-
que personis, unde cumque
generis super quocunque,
verint Merchandise, in-
ter firmus sit & stabilis;
ita quod neuter Mercat-
orum ab illo Contractu
possit discedere, vel res-
cindere, postquam denarius
dei inter principales per-
sonas contrahentes, de-
positus fuerit & receptus. Et
si forsan super contractu
huiusmodi contentio ca-
verit, fiat inde probatio
ut inquisitio securi dum
usus & consuetudines
Mercatorum, & illi cum
ibi dictum Contract-

the Customs which shall
be due, Wines only ex-
cepted, which shall not
be exported out of Our
said Kingdom or Domi-
nion, after they have
been imported into Our
said Kingdom or Domi-
nion, without Pleasure
and especial Licence, by
any way or means whatso-
ever.

Item, That the said Mer-
chants may lodge in the
Cities, Boroughs, and
Towns aforesaid, at their
own pleasure, and there
stay with their Goods, to
the content of them who
entertain them.

Item, That every Con-
tract made by the said
Merchants with what
Persons soever, and from
what Places soever, for
what kind of Merchand-
izes soever, shall be firm
and stable, so that neither
of the Merchants shall de-
part from, or go back
from his Bargain, after a
Gods-penny is given and re-
ceived between the prin-
cipal Persons contracting;
and if it happen that a
contention arise on the
said Contract, there shall
be a Tryal, or Inquisition,
according to the Usages
and Customs of the Fairs,
and Towns where such
Con-

Contract shall be made or begun.

Item, We promise to the aforesaid Merchants, and for Us, and our Heir, for ever grant, That We by no means whatsoever will make, nor suffer to be made, any Prize, or Arrest, or Detention by occasion of Prize, for the future, upon their said Wares, Merchandizes, or other their Goods by Us or by any other, or others in any case and necessity whatsoever, against the will of the said Merchants, without the price presently paid, for which the said Merchants might sell to others, Wares of the like sort for, or otherwise to satisfie them, so as they shall repute themselves contented. And that no Appraisment or Value shall be put upon the said Merchants Wares Merchandizes, or Goods, by Us or Our Ministers.

Item, We will, That all Bailiffs, and Officers of Fairs, Cities, Boroughs, and Market Towns, shall do speedy Justice to the said Merchants complaining to them, from day to day, without delay, according to the *Merchants Law*, concerning all and every thing which by the

um fieri contigerit, & iniri...

Item, Promittimus prefatis Mercatoribus pro nobis, & heredibus nostris, in perpetuum concedentes. Quod nullam priam vel arrestationem, seu dilationem occasione price de cetero de Mercimoniis, Merchandis, seu aliis bonis suis per nos, vel alium, seu alios, pro aliqua necessitate vel casu, contra voluntatem ipsorum Mercatorum aliquatenus faciemus, aut fieri patiemur, nisi statim soluto pretio pro quo ipsi Mercatores aliis hujusmodi mercimonia vendere possint, vel eis alias satisfactio ita quod reputent se contentos, & quod super mercimonia, merchandisas, seu bona ipsorum per nos, vel ministros suos, nulla appreciatio, aut aestimatio imponetur.

Item, Volumus, Quod omnes Balliui, & Justitii Fieriarum, Cibitatum, Burgozum & Villarum Mercatorum, Mercatoribus antedictis conquerentibus coram eis, celerem justitiam faciant de die in diem sine dilatione secundum LEGEM MERCATORIAM, de universis

in singulis que per e-
orum Legem poterunt
terminari. Et si forte in-
veniat defectus in ali-
quo Ballivorum vel Mi-
nistrorum predicatorum
vel eorum aliquis dilec-
tus in eadem sustineat
damnum, vel sustinuerit, licet
Mercator versus partem
principalem recupera-
rit dampna sua, nihilominus
Ballivus, vel Minister alius versus
eum, prout delictum ei-
us, puniatur, & puniti-
onem istam concedimus
Ballivorum Mercatorum
predicatorum pro eorum
servitia maturanda.

Item, Quod in omni-
bus generibus placita-
rum, salvo casu criminis
quo instigenda sit
pena mortis, ubi Mer-
cator impacitatus fuerit
placitum implacitaverit,
cuiusque conditionis
sem implacitatus exis-
tit, extraneus vel pri-
vatus, in Rundingis, Ci-
tatibus, sive Burgis
si fuerit sufficiens co-
mmerciorum predica-
torum terrarum, & in-
stitio fieri debeat, sit
dicta Inquisitionis de e-
dem Mercatoribus, & me-
tas altera de aliis pro-
prietariis & legalibus hominibus
illius, ubi placitum il-

lud Law may be determi-
ned. And if any defect
shall happen to be found
in any of Our Bailiffs or
Ministers aforesaid, where-
by the said Merchants,
or any of their Factors
shall suffer loss, although
the Merchant recover his
Losses against the Party
in the whole, yet never-
theless, the Bailiff, or o-
ther Ministers of ours, as
the fault requires, shall be
punished; and We grant
the said Punishment in
favour of the Merchants
aforesaid, for compleating
their Right.

Item, That in all kinds
of Pleas, saving in the
case of Crime, for which
the pain of Death is liable
to be inflicted, where the
Merchant shall be im-
pleaded, or he implead
another, of whatsoever
condition he that is im-
pleaded be of, whether a
Foreigner or a Dome-
stic, in the said Fairs,
Cities, or Boroughs,
where there is a sufficient
plenty of Merchants of
the Lands aforesaid, and
Inquisition there ought
to be made; half of the
Inquisition shall be of the
said Foreign Merchants,
and the other half of ho-
nest and lawful Men,
where the Plea happens
hap-

to be: And if a sufficient number of the Merchants of the said Lands shall not be found, let those be put in the Inquisition who shall be found fit in that place, and let the residue be of other good and fit Men, in the places in which that Plaint shall be.

Item, We will ordain, and appoint, That in every Market Town, and Fair of Our said Kingdom, and elsewhere within Our Dominion, Our *Weight* is to be put in a certain place, and before weighing thereof, the Scale to be empty in the presence of Buyer and Seller, and the Arms thereof to be equal; and when he hath set the Scale equal, he is forthwith to take off his Hands, so that it may remain equal, and that throughout Our whole Kingdom and Dominion, there be one Weight and Measure, both of them sealed with the Sign of Our Standard, and that every one may have a Scale of one *Quarteron* and under, where contrary to the Government of the said place, or Liberty by Us, or Our Ancestors it was not granted, or contrary to the

lud esse contigerit: Et de Mercatoribus videtur Terrarum numerus non invenitur sufficiens, ponantur in Inquisitione illi qui idonei inveniuntur ibidem, & residui sint de aliis bonis hominibus & idoneis, de locis in quibus placitum illud erit.

Item, *Volumus*, Ordinamus & Statuimus Quod in qualibet Mercatoria & Feria Regni nostri predicti, & alibi infra Potestatem nostram, Pondus nostrum in certo loco ponatur, & ante ponderationem Statuta in presentia Emptoris & Venditoris vacua videatur, & quod librae sint equalia, & tunc Pondatur ponderet in equali & Statutam posuerit in equali, statem amobius suas ita quod maneat in equali, quod per totum Regnum & Potestatem nostram unum pondus & una mensura, signo Standardi nostri nentur, & quod quilibet possit habere Stateram usque Quarteroni & infra, contra Dominum loci aut libertatem per se seu Antecessores nostrae concessam illud non faciat, sive contra Villam

aut ferarum consuetu-
dinem hactenus observa-
tam.

Item, Volumus & con-
cedimus, Quod aliquis
mercator homo, & fidelis, &
discretus London resi-
dens, assignetur Ju ita-
rius Mercatoribus memora-
tis, coram quo valeant
specialiter placitare, &
debita sua recuperare ce-
leriter, si Vicemites &
Hajores eis non face-
rent de die in diem ce-
leris iustitie complemen-
tum, & inde fiat Commis-
sio extra chartam de-
sentem concessa Mercat-
oribus antedictis, scilicet,
de hiis quæ sunt inter
Mercatores & Mercat-
per, secundum LEGEM
MERCATORIAM
obseruanda.

Item, Ordinamus &
Statuimus, & Ordinati-
onem illam Statutum-
que pro Nobis & Hæredibus
nostris in perpetuum Volu-
mus firmiter observari, quod
pro quacunque libertate
quam Nos vel Hæredis
nostri de cætero conce-
mus, prefati Mercatores
supra-scriptis Libertates,
vel earum aliquam non a-
mittant. Pro supra-dictis
autem Libertatibus & li-
beris Consuetudinibus
obtinendis, & Preiis nos-
tris remittendis eisdem

Custom of the Villages and
Fairs hitherto observed.

Item, We will and grant,
That some certain faith-
ful and discreet Person
residing in London, may
be appointed a Justice in
behalf of the before-men-
tioned Merchants, before
whom they may plead
specially, and more speedi-
ly recover their debts, if
the Sheriffs and Mayors
distribute not to them,
day by day compleat and
speedy Justice, that then
a Commission be granted
to the aforesaid Mer-
chants, besides this pre-
sent Charter, viz. con-
cerning those [Goods]
which are to be convey-
ed between Merchants
and Merchants, accor-
ding to the Merchants Law.

Item, We Ordain and
Appoint, and Our Will
and Pleasure is, for Us
and Our Heirs, That this
Ordinance and Statute be
firmly kept for ever, not-
withstanding any liberty
whatsoever which We or
Our Heirs for the future
shall grant; the said Mer-
chants ought not to lose
their above-written Liber-
ties, or any of them: And
for and in consideration
of their obtaining the
said Liberties and free
Usages, and Our Prises

to be remitted to them: All and singular the said Merchants for themselves, and all others on their part, have heartily and unanimously granted to Us that for every *Hogshead of Wine* which they shall bring in, or cause to be brought in within Our Kingdom or Dominion thereof; and from whence they are obliged to pay Freight to the Mariners, to pay to Us and to Our Heirs, by the Name of Custom, two Shillings over and above the ancient Customs due, and accustomed to be paid in *Pence* within forty days after the said Wines are put on shore out of the Ships

Item, For every *Sack of Wooll*, which the said Merchants or others in their Names do buy, and out of this Kingdom transport, or buy to transport, shall pay forty pence over and above the ancient Custom of half a Mark, which formerly was paid. And for a Last of Hides carried out of this Our Kingdom and Dominion thereof to be sold, half a Mark over and above, that which according to ancient Custom was formerly paid

sepediti Mercatores uniberi & singuli pro se & omnibus aliis de partibus suis, Nobis concorditer & unanimiter concesserunt quodde quolibet Dolio vini quod adducant, vel adduci faciant infra Regnum & Potestatem nostram, & unde Marina-riis fretum solvere tenebuntur, solvent Nobis & Heredibus nostris nomine Customæ, duos Solidos ultra antiquas Customas debitas, & in Denariis solbi consuetas, nobis aut aliis infra quadraginta dies postquam extra Pades ad Terram posita fuerint dicta bina.

Item, De quolibet Sacco Lanæ, quem dicti Mercatores, aut alii nomine ipsorum ement & de Regno nostro educent, aut emi & educi faciant, solvent quadraginta Denarios de incremento, ultra Customam antiquam dimidiæ Marcæ que prius fuerat persoluta. Et pro Lasto Coriorum extra Regnum & Potestatem nostram bebendorum dimidiâ Marcam, supra id quod ex antiqua Customa antea solhebatur; Et similiter de trecentis pellibus Lanutis, extra Regnum &

Potestatem nostram, deducendis, quadraginta denariis ultra certum illud quod de antiqua Custumia fuerat plus datum.

Item, Duos Solidos de qualibet Scarleta, & panno tanto in grano.

Item, Decem et octo denarios de quolibet panno in quo pars grani fuerit intermixta.

Item, Duodecim denarios de quolibet panno alioque grano.

Item, Duodecim denarios de quolibet Ceræ quintallo.

Cumque de prefatis Mercatoribus nonnulli eorum alias exercent Merchandis, et de aliis rebus subtilibus, sicut de pannis Laseu, de Serico, de Indatis, at Seta, et aliis liberis mercibus, et de ceteris etiam, ac aliis animalibus, Blado, et aliis rebus, Merchandis multitudine, ad certam Custumam facile poni non poterunt, item Mercatores concesserunt dare Nobis et Herede-
bus nostris de qualibet libra argenti estimationis seu valoris rerum et Merchandiarum huiusmodi quocunque nomine censeantur, tres denarios de libra in introitu

and likewise for three hundred Woollfels to be carried out of this Kingdom, forty pence, besides that certain Sum which according to antient Custom was formerly given.

Item Two Shillings for every Scarlet, and Cloth dyed in grain.

Item, Eighteen pence for every Cloth in which part of a grain colour is intermixt.

Item, Twelve pence for every other Cloth without grain.

Item, Twelve pence for every Quintal of Wax.

And whereas some of the said Merchants deal in other Commodities, as Goods weighed with *Avoir-du-pois* Weights, and in other fine Goods, as Cloth of *Tarse*, of Silk, of * *Candatis*, of Hair, and ^{* It is supposed it should be} in divers other Merchandises, in Horses also, and ^{Sindonibus, of} other Animals, Corn, and ^{hewn, Cam-} other Wares and Merchandises of different sorts, which cannot easily be put to a certain rate of Custom; The said Merchants have consented to give Us and Our Heirs for every Twenty Shillings estimation and value of those Wares and Merchandises, by whatsoever name

name they be called, three pence in the pound, upon the Entrance of their Wares and Merchandizes into Our Kingdom and Dominion aforesaid, within twenty days after such Wares and Merchandizes shall be brought into our Kingdom and Dominion aforesaid, and there shall be unladen, or sold. And likewise three pence for every twenty Shillings, at the Exporting of what kind soever of Wares or Merchandizes bought in Our Kingdom and Dominion aforesaid, besides the ancient Customs formerly given to Us, or to others. And over and above the value and estimation of the said Wares and Merchandizes for which three pence for every twenty shillings as aforesaid are to be paid; they are to have credit by Letters, by them to be produced from their Principals or Partners, and if they have none, Let it be determined in this case, by the Oaths of the said Merchants, or in their absence, of their Servants.

Moreover, It may be lawful for the Society of the Merchants aforesaid, to sell Wooll to the Fel-

introitu rerum, et Merchandisarum, ipsarum in Regnum et Potestatem nostram predictam infra biginti dies postquam huiusmodi Res et Merchandise in Regnum et Potestatem nostram adductæ, et etiam ibidem exoneratæ, et etiam ibidem exoneratæ, sive venditæ, fuerint. Et similiter tres denarii de qualibet libra argenti in eductione quarumcunque rerum, et Merchandisarum rerum, et Merchandisarum huiusmodi emptarum in Regno et Potestate nostra predictis, ultra Customas antiquas nobis, aut aliis ante datas. Et super valore et estimatione rerum et Merchandisarum huiusmodi, de quibus tres denarii de qualibet libra argenti sicut predictur sunt solvendi; credatur eis per litteras quas de Dominis aut sociis suis ostendere poterunt et si litteras non habebant, Stetur in hac parte ipsorum Mercatorum si presentes fuerint, vel ballearum suorum in eorum absentia iuramentis.

Liceat insuper Sociis Societate Mercatorum predictorum intra Regnum et Potestatem nostram pre-

dictam, Lanæ vendere aliis
sociis suis, et similiter e-
mere ab eisdem absque Cu-
stuma solbenda; ita tamen
quod solbenda; ita tamen
quod dictæ Lanæ ad tales
manus non debentant, quod
de Custuma nobis debita de-
fraudemur.

Et præterea est scien-
dum, Quod postquam sæ-
pediti Mercatores semel in
uno loco infra Regnum et
Potestatem nostram Cu-
stumam nobis concessam
superius, pro Merchandisiis
suis in forma solberint se-
predicta et suum habeant in-
de Warrantum, erunt libe-
ri et quieti in omnibus aliis
locis infra Regnum et Po-
testatem nostram predictam,
de solutione Custumæ bu-
jismodi pro eisdem Mer-
chandisiis, seu Mercimoniis
per idem Warrantum, si-
be hujusmodi Merchandisæ
infra Regnum et Potesta-
tem nostram remaneant,
sive exterius deferantur,
Exceptis binis que de Reg-
no et Potestate predictis,
sive voluntate et licentia nos-
tra sicut predictum est, nul-
latenus educantur.

Volumus autem, ac pro
Nobis & Hæredibus nos-
tris concedimus, Quod
nulla Exactio, Præstatio vel

low of the said Society,
and likewise to buy the
same one of another with-
in Our Kingdom and Do-
minion, without payment
of Custom: Provided that
the said Wooll come not
to such hands whereby
we may be defrauded of
Our Customs.

And furthermore be it
known, That after the
said Merchants have once
in any one place within
Our Kingdom and Do-
minion paid our Customs
granted, as aforesaid, to
Us, for their Merchan-
dizes in form aforesaid,
and thereupon they have
their Warrant, they shall
be free, and unmolested
in all other places within
Our Kingdom and Do-
minion, from payment of
the said Custom for the
same Commodities or Mer-
chandizes by the said
Warrant, whether such
Merchandizes remain with-
in Our Kingdom and Do-
minion, or are carried out,
Except VVines which with-
out Our leave or licence, as
aforesaid, are by no means
to be Exported out of our
Kingdom.

VVe will also, and for
Us, and our Heirs grant,
That no Exaction, Prise
or Loan, or any other
burden

burden shall be imposed in any part or measure on the persons of the said Merchants, their Merchandizes, or Goods, contrary to the form before expressed and granted.

Witness hereto, The Reverend Fathers Robert Archbishop of Canterbury Primate of all England, Walter Bishop of Coventry and Litchfield, Henry de Lacy Earl of Lincoln, Humphrey de Bohun Earl of Hereford and Essex, and Constable of England, Adomarus of Valentia, Galfrid of Geynvill, Hugh de le Spencer, Walter de Bello Campo Chamberlain of our House, Robert of Bures, and others. Given by Our Hand at Westminster the First day of February.

Prestatio, aut aliquod aliud onus super personas Mercatorum predictorum, Merchandisas, seu bona eorundem aliquatenus imponatur, contra formam expressam superius, et concessam.

Hic testibus venerabilibus Patribus Roberto Cantuariensi Archiepiscopo totius Angliæ Primare, Waltero Coventræ Litchf. Episcopo, Henrie de Lacy, Comite Lincoln, Humfrido de Bohun, Comite Hereford. & Essex. ac Constabular. Angl. Adomar. de Valentia, Galfrido de Geynvill, Hugone le de Spencer, Waltero de Bello Campo Senescallo Vestri nostri, Roberto de Bures et aliis. Dat. per manum nostram apud Westm. primo die Febr.

Sir John Davies in the Case of Customs.

Vide the Stat. 12 Car. 2. of Tunnage and Poundage.

VIII. Subsidy is a Duty payable for Merchandizes Exported and Imported, granted by Act of Parliament for the life of the King. And are,

1. Aids and Subsidies payable out of Native Commodities Exported and Imported.

2. *Tunnage*, which is a Subsidy out of Wines of all sorts; and *Poundage*, which is a Subsidy granted out of all Commodities Exported and Imported, except Wines and ancient Staple Commodities, and is the twentieth part of the Merchandize, Imposts or Duties payable for Merchandizes rated and assessed by Parliament; and then they are in the nature of Subsidies imposed by the King's Prerogative.

The Rates are generally agreed on by the Commons House of Parliament, and are expressed in a Book commonly

commonly called the *Rates of Merchandize*; that is to say, the Subsidy of Tunnage and Poundage, and the Subsidy of Woollen Clothes or old Drapery, and are subscribed with the hand of the Speaker.

IX. All Merchant-Strangers bringing in any sort of Wines, are to pay Thirty shillings on the Tun over and above the Rates which the Natives pay, including Twenty shillings the Tun formerly paid to his Majesty by the name of *Southampton Duties*, for all Wines of the growth of the *Levant*; for which sort of Wines, the Stranger is also to pay to the use of the Town of *Southampton* for every Butt or Pipe Ten shillings.

Vide in tit. Prifage.

Aliens are likewise to pay the ancient Duty of Buttlage, which is 2 s. per Tun.

Rule, That all such Wines as shall be landed in any of the Out-Ports, and Custom paid, and afterwards brought to the Port of London by Certificate, shall pay so much more Custom as they paid short of the Duty due in the Port of London.

Directions in Tunnage.

For every Tun of Beer to be exported in shipping English built in Money must be paid Two shillings: And for every Tun of Beer Exported in any other shipping in Money six shillings.

Directions in Poundage.

X. If there shall happen to be brought or carried out of this Realm any Goods liable to the payment of Custom and Subsidy which are omitted in the Book of Rates, or are not now used to be brought in or carried out, or by reason of the great diversity of the value of some Goods could not be rated; That in such case every Customer or Collector for the time being, shall and may levy the said Custom and Subsidy of Poundage according to the value and price of such Goods to be affirmed upon the Oath of the Merchant in the presence of the Customer, Collector, Comptroller and Surveyor, or any two of them.

XI. Every *Englishman* shall pay for every short Cloth containing in length not above 28 Yards, and in weight not above 64 lb. white or coloured by him to be shipped and carried out of this Kingdom, Three shillings four pence, being after the rate of Two farthings and half a farthing and pound weight.

Directions for the payment of the Subsidy upon Woollen Cloth or old Drapery.

And

And so after that rate for all other sorts of Clothes of greater length and weight, allowing not above Twenty eight Yards, and sixty four pound to a short Cloth; that is to say, for every pound weight over and above sixty four pound, two farthings and a half farthing: And for all other sorts of lesser Clothes to be allowed to a short Cloth; that is to say, every Stranger shall pay for every short Cloth *cont.* in length not above 28 yards, and in weight not above 64 lb. white or coloured, by him to be shipped or carried out of this Kingdom, Six shillings eight pence, besides the old Duty of one shilling and two pence.

And so after that rate for all other sorts of Clothes of greater length and weight; and for all sorts of lesser Clothes to be allowed to a short Cloth; That is to say,

Dorset and Somerset Dozens, Rudge washt, Cardinals, Pinwhites, Straits, Statuets, Stockbridges, Tavestock, seven of each sort shall be allowed to a short Cloth.

Tauntons, Bridgwaters, and Dunstars, the fifty not exceeding 64 lb. in weight; *Devon. Dozens* containing 12 or 13 yards, in weight 13 lb. five to be allowed to a short Cloth.

Ordinary *Pennystones*, or *Forest Whites cont.* between 12 or 13 yards, and in weight 28 pounds, *Shorting Pennystones cont.* 13 or 14 yards, and in weight 32 pounds unfized, four to be allowed to a short Cloth.

Narrow *Yorkshire Kersies Whites and Reds, cont.* not above 17 or 18 yards, and in weight 22 pound. *Hampshire ordinary Kersies, Newberry Whites,* and other Kersies of like making *cont.* 24 yards, and in weight 28 lb. *Sorting Hampshire Kersies cont.* 28 pounds and in weight 32 pound; Three of them to make a short Cloth.

Northern Dozens, single sorting *Pennystones cont.* between 13 and 15 yards, and in weight 53 pounds Frized, Two of them to make a short Cloth.

And the Northern Dozens double, one to be accounted for a short Cloth.

All which shall go and be accounted for short Clothes, and shall pay after the rate of the short Cloth.

Cloth before rated, and for over-weight two farthings and one half the pound.

The new sort of Cloth called the *Spanish* Cloth, otherwise Narrow Liff, Western Broad Cloth not exceeding 25 yards in length, and 43 pounds in weight, to be accounted two thirds of the short Cloth before rated.

And for every pound weight exceeding 43 pounds, two farthings and half farthing the pound weight.

Cloth Rashes, *alias* Cloth Serges, *cont.* 30 yards weighing 40 pound, to be accounted two thirds of the short Cloth before rated.

And for every pound exceeding 40 pound weight, two farthings and half a farthing the pound weight.

And for any other sort of Woollen Cloth of the Old or New Drapery, and not mentioned in that Book, to pay two farthings and half a farthing the pound weight: And for any other sort of Woollen Cloth of the Old or New Drapery and not mentioned, is to pay two farthings and half a farthing for the Subsidy of every pound thereof.

By the Book of Rates annexed to the Act of Tunnage, and Poundage 5 *l.* per Cent. are allowed to the Merchants out of the Subsidy for Poundage, and 10 *l.* more for ready Money: And whereas 12 *d.* in the Pound is due and payable to the King for Poundage, 6 *d.* in the Pound more is given by another Act called the Additional Duty. And whether or not 5 *l.* per Cent. shall be allowed out of this Additional Duty, or not was the Question. *Per Curiam*, 5 *l.* per Cent. ought to be allowed out of the Additional Duty, as well as out of the 12 *d.* per Pound, for it appears in divers Places of the Book of Rates, that 6 *d.* in the Pound is lookt upon as part of the Subsidy of Poundage, and 5 *l.* is to be allowed out of all Subsidies. The Book of Rates is Incorporated into the Act of Parliament, and is part of it, so that whatever is there must be taken as comprised in the Body of the Act it's self, *Papillion* against Sir John Harrison, *Hardress*, 349.

C H A P. XIII.

Of Impositions Subsequent, Conditional, Temporary, &c.

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| <p>I. Of Impositions on the Manufactures of Fance by Lex Talionis.</p> <p>II. On Vinegar, Perry, Cider, and Rape, Customs payable by Denisons and Strangers, and Log-wood made Importable.</p> <p>III. On Ships that have not two Decks, and 16 Guns.</p> <p>IV. On Salt, Beer, Sider, Perry, Vinegar, a further Duty.</p> <p>V. Of the Duty called Coynage, and upon what imposed; and the temporary Imposition called the Additional Duty.</p> <p>VI. Of Goods particular Imported by Aliens; and Rules for petty Customs and other matters relating to Duties.</p> <p>VII. Of Aliens Customs on Fish and other Commodities, and Rates upon the same.</p> <p>VIII. Impositions on Foreign</p> | <p>Liquors, and Rates on the same.</p> <p>IX. Of Native Commodities, and such as were formerly prohibited, may be transported paying certain Duties.</p> <p>X. Beer, &c. Exported; Skins, Leather, &c. Transportable paying certain Duties.—Bullion and Coyn only excepted.</p> <p>XI. Of Spices importable by any Nation.</p> <p>XII. Of great and lesser Officers Fees, and of Goods not paying one pound Custom in or out what Fees to be taken.</p> <p>XIII. Voluntary Gifts from some esteemed on Bribes and Rates about payment of Fees.</p> <p>XIV. Of Allowances for Jury what.</p> |
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Subsequent
Impositions
to the Act of
Tonnage and
Poundage,
and the Book
of Rates.

12th CAR. 2.

This collected
as the Tun.

I. **T**HERE are several Duties imposed subsequent to the Duties payable by the Book of Rates and over and above the same; that is to say, on all Ships belonging to the French King's Subjects, which shall lade or unlade any Goods in this Kingdom, or set on shore or take in any Passenger, or pay 20^s per Tun: This was an Oliver for a Rowland, the French King having done us the like kindness, by imposing the value of 50 Solz on every English Ship; this Complement lasted but three weeks longer than the French King's; his removed, ours drops.

II. So likewise on Vinegar, Perry, Rape, Cider and Cider-cage imported from Foreign parts per English

shall answer Six pounds ten shillings *per Tun*; and by Strangers, then but six pounds. nage and Poundage is directed.

But if they shall Export, then Three pounds ten shillings *per Tun* shall be repaid to the *English*, and four pounds fifteen shillings to be repaid to Strangers. 14 Car. 2. c. 11. For prevention of Fraud:

The Statute of *Eliz. cap.* prohibiting the Importation of Log-wood, repealed; and the same may be exported paying 5 *l. per Tun*: And in case of Exportation then to be repaid 4 *l. per Tun*. 14 Car. 2. c. 11.

III. The Parliament taking likewise again into consideration the encouragement of Trading in Ships of force, have imposed on all Goods and Merchandise imported and exported from and to the Mediterranean Sea, beyond *Malaga*, in any Ship that hath not two Decks and sixteen Pieces of Ordinance mounted, and two Men to each Gun, to pay over and above the Rates imposed by the Book of Rates 1 *per Cent*. This does not extend to Ships laden with Fish, or half laden with Fish and other Commodities. 11 Car. 2. cap. 11.

IV. So likewise on Salt out of *Scotland* into *England*, half-penny *per Gallon*.

Again, there is imposed on Wines, Vinegar, Cider and Beer, ten shillings *per Tun*; and on Brand and Strong-Waters 20 *s. per Tun*. For the Coynduty, the Monies that arise on this Duty are to be paid at the Custom-House to the Collectors and Officers, to be by them kept apart from all other Monies, and paid Quarterly into the Exchequer without Salery or Fee: The Goods are forfeit for non-payment of this Duty; and the same is to be re-paid, if the Goods are transported within the year. 18 Car. 2. cap. 5.

V. There was likewise an Imposition of 12 *l. per Tun* on *Spanish* Wines, and 8 *l. per Tun* on *French* Wines and Vinegar, which was but temporary, and ended the 24th of *June*, 1678. 22 Car. 2. c. 3.

VI. There are also Duties payable by all Aliens for Goods imported in Aliens Ships, commonly called *Navigation-Duties*. Per Act of Nav. 12 Car. cap. 18. V. de the Statutes and the particular Cap.

So likewise all Goods of the growth, product, or manufacture of *Muscovia* or *Russia*, and also of *Turkey*.

modities enu-
merated
there.

Rule.

Note, That in all cases where petty Custom is payable, it is to be understood of the fourth of the full Subsidy according to the Rates and lue in the Book of Rates, before the 5 *l. per Ce* deducted.

Rule.

Vid. the Table of Duties.

of strangers
Duties upon
Wines.

14 *Car. 2. Vide*

Table of

French Wines.

Act of Navi-

gation, 12 *Car.*

2 *cap. 18.*

Act of Trade

15 *Car. 2. cap.*

7. *Vide Stat.*

and the par-

ticulars enu-

merated.

Note, Wines of all sorts imported are to pay

Note, That the Neat Subsidy of Vinegar, Rape, Cider, and Cider-eager both in *London* and Ports, is the same with the Subsidy of *French W* payable in *London*.

VII. So likewise there is a further Imposition of Aliens Custom for all Fish, Oil, Blubber, Whale-bone, or Whale-fins, not being caught in *V* belonging to *English Men*, are to pay double *Stran* Custom.

So likewise Custom and Impost to be paid for all sorts of salted or dried Fish not imported in *English* built, or belonging to *England*, and not having been stifled and caught in such Ships.

Rule.

Upon which ACT, *Note*, That the 5 *per Cent* not to be allowed of the Petty Custom.

12 *Car. 23, 24.*

22 *Car. 2. 4.*

VIII. There is likewise an Excise or Impost on Foreign Liquors imported; that is to say, *Be* Ale 6 *s. per* Barrel; Cider or Perry the Tun ten *lings*; Brandy or Strong-waters perfectly made *per* Gallon.

15 *Car. c. 11.*

If any of those Goods be landed before those duties be fully paid, and Warrant signed, and without the presence of an Officer, they are forfeited to the former half.

IX. There are likewise Duties imposed on several commodities Exported by several Acts of Parliament subsequent to the Act of Tunnage and Poundage.

Act for Trade

15 *Car. 2.*

cap. 7.

Coals transported in *English* Shipping and Navigation for his Majesties Plantations in lieu of all custom, shall pay only for one Chaldron of *New-C* measure 1 *s. 8 d.* For one Chaldron *London* measure 1 *s.* provided good Security be given for landing said Coals accordingly.

Act for Til-

lige, 22. *Car.*

2. *cap. 3.*

There are likewise several Native Commodities and Cattell prohibited by divers Acts of Parlia-

not to be transported unless sold under such prizes;
non obstante they may now be exported, paying
 custom according to the Book of Rates.

X. There is likewise an Imposition on Beer, Ale, ^{2^o, 23 Car. 2.}
 and Mum to be exported, to pay 1 s. *per* Tun and no ^{20 Car. 2.}
 more; but this is but *pro tempore* for six years. ^{cap. 5.}

So likewise Leather of all sorts, Sheep-skins,
 Calve-skins, tanned or dressed, *non obstante* any for-
 eign Law, paying for each hundred weight ^{20 Car. 2,}
 2 l. weight one shilling and no more: This ended ^{cap. 5.}
 25th of March, 1675. and both of them to the
 end of the next Sessions of Parliament after.

Likewise all sorts of Foreign Coyn or Bullion of ^{Act for Trade}
 Gold or Silver may be Exported without paying any ^{15 Car. 2.}
 duty or Fee for the same, Entry being first made in ^{cap. 7.}
 the Custom-house; the like for Diamonds, Precious-
 stones, Jewels, and Pearls of all sorts.

XI. All Persons whatsoever may import from any ^{Proclam. C. r.}
 place beyond Sea in *English* Ships, Mace, Nutmegs, ^{Regis, Dec. 20.}
 innamon, Cloves into *England, Wales, Jersey, Guern-* ^{1662. Aug. 26.}
 sey, paying the Customs thereof. Provided before ^{1663. But see}
 the lading thereof they give notice to the Commis- ^{14 Car. 2. con-}
 sioners or Farmers of the Customs, of the quantity ^{cerning Cu-}
 and quality they intend to lade, with the name of the ^{stoms.}
 vessel in which they intend to import the same, and
 procure a Licence under the hands of the said Far-
 mers or Commissioners, or any three of them for the
 exporting the same.

Note, If Goods are wreck'd, and the Lord seizes
 them, yet they ought not to pay Custom. * So held

Three Justices, *contra*. Chief Justice Treby, Trin. 11. * Sir Francis
 3. Co. Pl. Courtrey against Bower. Moor's Report

Ham's Case. The like not since adjudged in the *Common Pleas* (on a special
 verdict found at St Edmonds-Bury in Suffolk) about Mich. or Hill. 25, &
 Car. 2. fol. 224. Lord

XII. Fees and allowances due and payable to the
 Officers of his Majesties Customs and Subsidies in the
 Port of London, and the Members and Creeks there-
 to belonging; that is to say, to the Officers of
 the Petty Customs Outward, Subsidy Outwards;
 Petty Customs Inwards, Subsidies Inwards; Great
 Customs,

Virtute cuius-
dam Ordin. a
Dom. Com.
Sabbati 17
Maij, 14.
Car. 2. Regis.

Customs, Clerks Fees Inwards and Outwards, the King's Waiters being in number Eighteen, the Register of the King's Warrants, the Usher of the Custom-house, Gaugers of *French* Vessels, chief Searcher, and his Majesties five under Searchers in the Port of *London*; and the two Searchers at *Gravesend* were all set and entred in a Table; the same was settled by the Commons House of Parliament, and signed by the Right Honourable Sir *Edward Turner* late Lord Chief Baron of his Majesties Court *Exchequer*, and then Speaker to the Commons House of Parliament; at which time the Question being put, That for all Goods not paying one pound Custom in or out, there shall be but half Fees taken for *Cocquets*, Warrants, Debentures, Transfers or Certificates, it was resolved in the affirmative.

XIII. Societies or Companies trading in a joint stock, and making but one single Entry, the Adventurers being many, the Table of Fees does not hinder, but the Officers and Waiters may receive for gratuity as the Company voluntarily give.

All Goods under the value of 5*l.* in the Book Rates, paying Subsidy the Sum of 5*s.* or less, shall pass without payment of Fees.

English Merchants that shall land out of one Ship at one time, (although the receipt of the Subsidy distributed into several Offices) shall not pay any more than for a single Entry.

The Goods of Partnership to pass as if the property were in one single Person.

Fish by *English* in *English* Shipping or Vessels Inwards or Outwards all along the Coast, to pay no Fee.

Post-entries inward to pass without Fee under five shillings; if above five shillings and under four shillings, then six pence: But if the Custom to be paid exceed 4*s.* then full Fees.

The Merchant shall pay for all Goods opening to be short entred above 10*s.* Custom.

The Merchant shall pay for weighing of all Goods that shall be short entred above 20*s.* Custom.

The Merchant is not to be at any charge, if duly entered.

XIV. There is likewise to be allowed to the Merchants a certain abatement called *Tare*, for Goods and Merchandize, the which is reduced into a Table and cannot be deviated from in any case within the Port of *London*, without special direction of the Commissioners or Farmers; or in their absence of the consent of the General Surveyors, and Surveyor of the Ware-house, or of two of them at the least, whereof the Surveyor of the Ware-house to be one; and in the out Ports not without the Consent and advice of the Collector and Surveyor: Or where there is no Surveyor, by the Collector himself, giving speedy notice to the Commissioners or Farmers of the reason of so doing.

Tare and Tret, the first is the weight of the Cask, or Bale, or Covering wherein Goods are packed; the other is a consideration allowed in the weight for emptying and retelling the Goods,

C H A P. XIV.

**Of Scavage, Package, Porterage, Water
Baillage, Ports, Members, Creeks, the
Port of London, and places lawful to lade and
unlade in.**

- | | |
|--|--|
| <p>I. Scavage, <i>what, where payable, and to whom.</i></p> <p>II. <i>Who pay the same, and how regulated and governed.</i></p> <p>III. <i>Goods omitted in the Scavage, Table of Rates, how to pay.</i></p> <p>IV. <i>Of Package, how governed, and where payable.</i></p> <p>V. <i>Where Strangers shall pay as of old.</i></p> <p>VI. <i>Of Packers, Water-side Porters, what Duties Strangers are to pay for shipping out their Goods.</i></p> <p>VII. <i>Of the Duty of Water-Baillage.</i></p> | <p>VIII. <i>Of Ports, Members, and Creeks, what are meant and understood by them in reference to action, lawful or unlawful.</i></p> <p>IX. <i>The several Ports, Members and Creeks in England and Wales.</i></p> <p>X. <i>Of the extent of the Port of London.</i></p> <p>XI. <i>Of the several Keys, Wharves and other places lawful for landing of Goods.</i></p> <p>XII. <i>What Goods are excepted which may be shipped or landed at other places.</i></p> |
|--|--|

I. Scavage is an ancient Toll or Custom exacted by Mayors, Sheriffs, &c. of Merchant-Strangers for Wares shewed or offered to sale within the Precincts, which is prohibited by the Statute of *H. 7. cap. 8.* in a Charter of King Henry the Second to Canterbury, it is written *Scavung.*

The City of London still retains the Custom of, which in an old printed Book of the Customs of London it is there mentioned, and how to be disposed; of which Custom, halfe is del apertepnyeth to the Sheriffs and the other halfe del to the Porters, in whose houses the Merchants been lodged; And it is to wet that Scavage is the shew, by cause that Merchants shewen unto the Sheriffs Merchandizes of the which Customs ought to be taken oze that are there be sold, &c.

II. The Scavage that is taken consists of two parts

that which is payable by Denizens, and that which is required of Aliens: And that all Persons subject to such Duties might not be imposed upon, there are Tables mentioning the particular Duties set up and approved by the Lords Chancellor, Treasurer, President, Privy-Seal, Steward, and two Justices of the *King's-Bench* and *Common-Pleas*; and by them subscribed, or any four of them at least: The which Duties are on *Goods* Inwards and Outwards.

III. *Note*, All Goods mentioned in the Table of *Scavage*, and not mentioned in the Table of Rates, shall pay after the Rate of one penny in the pound, according as they are expressed and valued in his Majesty's Book of Rates, and all others not expressed therein, shall pay the same Rates according to the true value.

Per Order of
K. Charles I.
subscribed by
William Lord
Bishop of Lon-
don. H. Earl of
Manchester,
L.C.J. Bramp-
ston, and Lord
Liffleton.

Note, That all private Baulks 8 inches square and upwards, are by the 23 Article annexed to the Book of Rates reputed Timber, and valued at 3 *d.* the Foot, 50 Foot making one Load, the value of which is 12 *s.* 6 *d.* and the Subsidy for one Load $\frac{1}{2}$ of one penny, or one half penny and half one farthing, out of which the 5 *per Cent.* is to be deducted.

IV. There is likewise another Duty called *Package*, the which is likewise set and rated in a Table, and the which is taken of all the several Commodities therein mentioned.

All Goods not mentioned in that *Table*, are to pay for *Package* Duties, after the rate of one penny in the Pound according as they are expressed or valued in his Majesty's Books of Rates, and all others not expressed therein shall pay the same rate according to their true value.

For every Entry in the Packer's Book for writing Bills to each Entry outward, as usually they have done, 12 *d.*

V. The Strangers are to pay the labouring Porters for making up their Goods, at their own charge, as always they have done.

Strangers are likewise to pay the Water-side Porters belonging to the Package Office, such Fees and Duties for Landing and Shipping their Goods, as they

they usually have done within these ten years.

VI. The Packers Water-side Porters have Table of Duties for landing of Strangers Goods, and for the shipping out their Goods; and Goods not mentioned in the Table are to pay Portage Duties as other Goods do of like Bulk or condition therein expressed.

VII. There is another, ancient Duty called *Water Baillage*, which the City of *London* have received time out of mind, viz. for all Goods and Merchandize imported as well from any Port within the Realm to the Port of *London*, as from any part of the Realm to the same, and so the like Duties (with some variances) for all such Goods as shall be exported from the Port of *London* to any other Port within the Realm, so likewise without: Of this Duty all the Citizens and Freemen of the City are exempted; and though the same is very ancient

* 5 July, 1

Joh.

7 R. 2 num 37

* and was once but small, in regard, within memory, it was looked upon as an Honour for a Merchant to be a Citizen of *London*, and so consequently freed but now, especially since the late Wars, abundance of Persons eminent both for Honours and Estates being unwilling to entangle themselves in the public Affairs of the City, do refuse absolutely to accept of the Freedom of the same, since which there have been great Contests with those Traders; and though the Coast Duties have been agreed to, yet the Foreign now arising to some considerable value, is highly disputed. And though Charters, Acts of Parliament, Common-Councils, continued Tracts and Foot-Steps of ancient Evidences and Records are yet extant to evince and make out the most apparent Title that may be, the same nevertheless labours under the greatest difficulty amidst the divisions of its Proprietors.

1 Aug. 21 R. 2.
entered in the
City-Book
called *Dun-*
thorn, fol 96.
197. Reper-
tory ult. Aug.
19 H. 1. 20 H.
3 Jac. 1. &c.

Portus quæ publicus non solum mercibus xonerandis inservit, sed ut naves ibi tutum receptaculum habeant, & jure debito ac securitate fruantur Navigantes quatenus innocuum iter & stationem quarunt. Hinc Portus & Navalia privilegio publicæ gaudent. Arg. 1. Leg. 1. §. stationem D. de flum. cap. 2 Jur. Nautic. Sac. 1. 1. §. 1. 4 H. 4. 20.

VIII. Port, or *locus publicus*, are those places which the Officers of the Customs are appropriated, which contain and include all the Priviledges and Guidance of all Members and Creeks thereunto allotted. *Members*

Members are those places where anciently a Custom-house hath been kept, and Officers or their Deputies attending, and are lawful places of Exportation or Importation.

Creeks are places where commonly Officers are or have been placed by way of prevention, not out of duty or right of attendance, and are not lawful places of Exportation or Importation without particular Licence or Sufferance from the Port or Member under which it is placed.

IX. The several Ports and Members as now they account at the Custom-house, are,

| Ports. | Members. | Creeks. |
|-----------|--------------------------|--------------|
| London. | _____ | Gravesend. |
| | _____ | Leigh. |
| | Malden. _____ | Burnham. |
| | _____ | West Mersey. |
| Ipswich. | Colchester. _____ | East Mercy. |
| | _____ | Brickley. |
| | _____ | Wivenhoe. |
| | _____ | Maintree. |
| | _____ | Harwich. |
| | Woodbridge. _____ | |
| Yarmouth. | Albrough. _____ | Orford. |
| | _____ | Dunwick. |
| | Sowold. _____ | Walderswich. |
| | _____ | Lestoffe. |
| | Blackney and Cley. _____ | |
| Lynn. | Wells. _____ | Burnham. |
| | _____ | Hitcham. |
| | _____ | Cross Keys. |
| | _____ | Wisbeech. |

Portus est conclusus locus quo importantur merces & exportantur, l. 59. de verb. Sign. Alias statio, quod ibi tuto naves stare possint, leg. 1. §. 13. D. de fium.

Boston.

Ports.

Members.

Creeks.

| | |
|-------------|--|
| Boston. | { Spalding. Fosdick. Wainfleet. Numby Chappel. Thetlethorp. Salt-fleet. |
| Hull. | { Grimsby — Gainthorp. Bridlington. Scarborough. |
| New-castle. | { Whitby. Stockton. — Middleborough. Hartlepool. Sunderland. Shields. Seaton delaval. Blith nooke. |
| Berwick. | { Aylemouth. Warnewater. Holy Island. East Marches, containing the Coast of Northumberland, bordering on Scotland. |
| Carlisle. | { West Marches, containing the Coast of Cumberland, bordering on Scotland. Whitehaven. — { Workington. Ravinglas. Milnthorpe. |

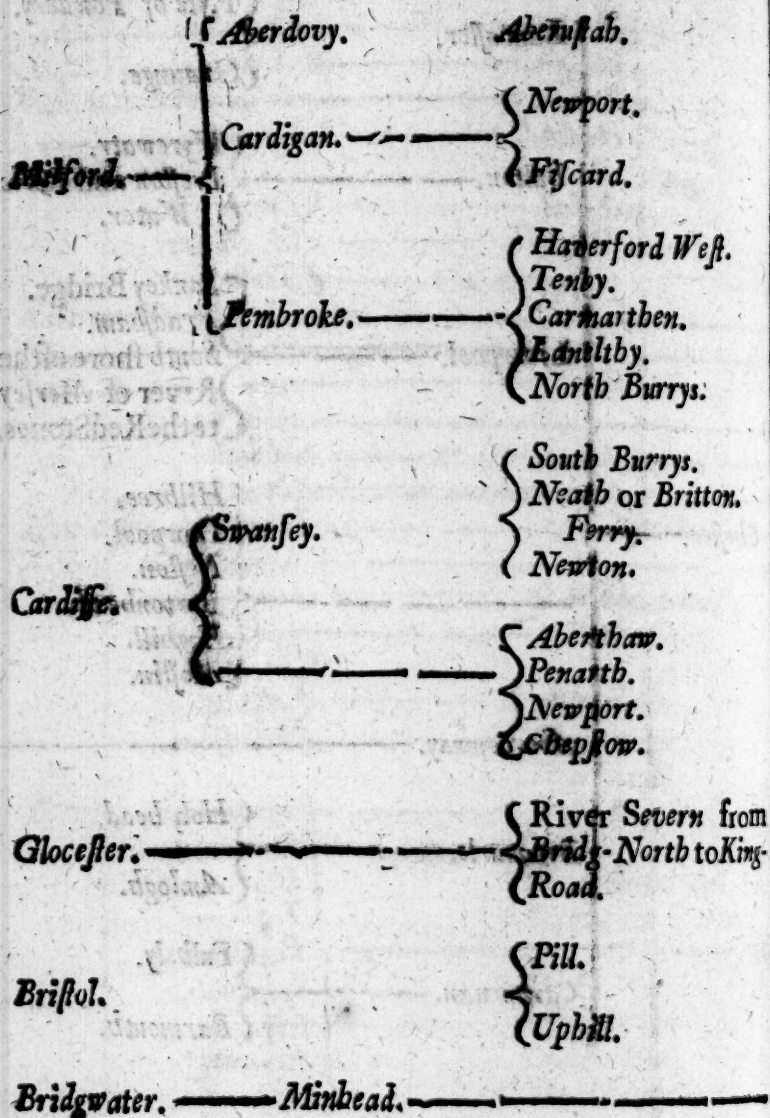
| | | |
|-------------|---|--------------------|
| Lancaster. | { | P.yte of Fowdery. |
| | { | Graunge. |
| Bulton. | { | Wyrewatr. |
| | { | Preston and Ribble |
| | { | Water. |
| Liverpool. | { | Sankey Bridge. |
| | { | Fradsbam. |
| | { | South shore of the |
| | { | River of Mersey |
| | { | to the Red Stones. |
| Chester. | { | Hilbree. |
| | { | Dawpool. |
| | { | Neston. |
| | { | Burtonhead. |
| | { | Baghill. |
| | { | Mosfin. |
| Aberconway. | | |
| Bewmaris. | { | Holy-head. |
| | { | Amlogh. |
| Carnarvan. | { | Pulbely. |
| | { | Barmouth. |

Milford.

Ports.

Members.

Creeks.



Plymouth.

Members.

Creeks.

Padstow. _____
 St. Ives. _____
 Penzance. _____
 Helford. _____

Falmouth. _____ { Penryn.
 St. Maures.
 Truro.

Fowey. _____
 Looe. _____

_____ { Saltsb.
 Stonehouse.
 Cousland.

Ilfracomb. _____

Barnstable. _____ { Cleavelly.
 Appledore.
 Buddiford.

_____ { Tincomb.
 Starcross.
 Bear and Seaton.
 Topsham.
 Pouldram.
 Sydmouth.
 Lympton.
 Exmouth.
 Aylmouth.

Dartmouth. _____ { Salcomb.
 Brixham.
 Torbay.
 Totnes.

Poole.

Ports.

Members.

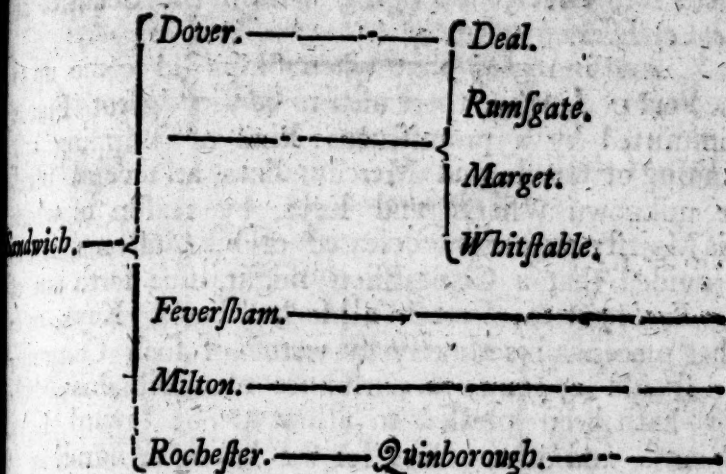
Creeks.

| | | | |
|------------------|-----------------|---|-----------------|
| | Lyme. ——— | { | Bridport. |
| | | } | Charmouth. |
| Poole. ——— | Weymouth. ——— | { | Portland. |
| | | } | Lulworth. |
| | | { | Swanidge. |
| | | } | Wareham. |
| | | { | Christchurch. |
| | | } | Hinington. |
| Southampton. ——— | Cows. ——— | { | Tarmouth. |
| | | } | Newport. |
| | Portsmouth. ——— | | Emsworth. |
| | Arundel. ——— | { | Pagham Point. |
| | | } | Selfey. |
| | Shorham. ——— | | Brighthelmston. |
| Chichester. ——— | Lewis. ——— | { | New Haven. |
| | | } | Seaford. |
| | Pemsey. ——— | | |
| | Hastings. ——— | | |
| | Rye. ——— | { | Winchelsea. |
| | | } | Lyd. |
| | | } | Rumney |
| | Hyth. ——— | | |

Ports.

Members.

Creeks.



Note, All the Ports and Havens in England are in the Corpus Comit. and that the Court of Admiralty cannot hold Jurisdiction of any thing done in them. *Holland's Case*, Earl of *Exeter*, 30 H. 6. And because he held Plea in the Admiralty of a thing done *infra Portum* *Hull*, damages were recovered against him two thousand pounds. *Vide Mich. 12 Jac. C. B. Greenway versus Barber, Godbolt 260, 261.*

IX. In regard that the Port of London is of great concern in relation to the Customs, the extent and limits of the same Port is by the *Exchequer* settled, which is declared to extend and be accounted, from the Promontory or Point called *North-foreland* in the Isle of Thanet, and from thence *Northward* in a supposed line to the opposite Promontory or Point called the *Nase*, beyond the *Gunfleet* upon the Coast of *Essex*, and continued Westward through the River of *Thames*, and several Channels, Streams and Rivers falling into it, to *London-Bridge*, save the usual and known Right, Liberty and Privilege to the Ports of *Sandwich* and *Ipswich*, and either of them, and the known Members thereof, and of the Customers, Comptrol-Searchers, and other Deputies and within the

Ad Portus instaurationem, quia publica utilitatis gratia sit, omnes subditi loci conferre operas debent, lib. 7. C. de oper. publ. Portus intuitu fluminis quo ambitur, et navigium statione penditur, est publicus et hodie Regalibus accensitur, §. 2. Inst. de rer.

die. l. 4. §. D. eod. c. un. que sunt Rega.

said Ports of *Sandwich* and *Ipswich*, and the several Creeks, Harbours and Havens to them or either of them respectively belonging within the Counties of *Kent* or *Essex*.

X. And in regard that when Ships did come up to the Port of *London*, there used to be very great Frauds committed by a promiscuous kind of shipping and landing of Goods and Merchandizes at several blind or unknown Wharfs and Keys, by reason of which his Majesty was often defeated of his Customs, it was provided that a Commission might issue forth out of the *Exchequer* to ascertain all such Wharfs, Keys, or other places as his Majesty by virtue of such Commission should appoint, in pursuance of which his Majesty hath been pleased to allow to be lawful Keys Wharfs, and other places for the lading or landing of Goods.

Brewers Key.

Chesters Key.

Wooll Dock.

* *Custom-house.*

Key.

} * Some Stairs on the West side thereof are declared not to be a place for shipping or landing of Goods.

Porters Key.

Bear Key.

† *Sabbs Dock.*

} † Excluding the Stairs there, which are declared no lawful place for shipping or landing of Goods and Merchandizes.

Wiggons Key.

Toungs Key.

Ralphs Key.

* *Dice Key.*

} * The Stairs there declared unlawful for shipping or landing of Goods and Merchandizes.

Smarts Key.

† *Smarts Key.*

} † The Stairs there declared no lawful place for shipping and landing of Goods and Merchandizes.

Lyon Key.

Butolph Wharf.

Hamons Key.

* *Gaunts Key.*

} * The Stairs on the East declared unlawful for shipping or landing of any Goods, &c.

Cocks Key.

One other place betwixt *Cocks Key* and *Fresh Wharf*, called part of *Fresh Wharf*, the Stairs are declared to be unlawful for shipping or landing of any Goods, &c.

Fresh Wharf.

To be a common open place for the landing or bringing in of Fish, Salt, Victuals, or Fuel of all sorts, and all Native Materials for Building, and for Fruit (all manner of Grocery excepted,) and for carrying out of the same, and for no other Wares or Merchandize.

Billingsgate.

May be allowed a place convenient for landing of any kind of Corn bought or provided for Provision or Victualling of the City of *London*, and not upon any private or particular Persons account, and for no other Goods or Merchandize.

Bridge House
Southwharf.

XI. It may be lawful for any Person to ship or lade into any Ship or Vessel on the River of *Thames* bound over Seas, Horses, Coals, Beer, ordinary Stones for Building: Fish taken by any of his Majesties Subjects, Corn or Grain, the Duties being paid and Cocks and other lawful Warrant duly passed for the same.

So likewise Deal-boards, Balks, and all sorts of Masts and Great Timber may be unshipt and laid on Land at any place between *Lyme-house* and *Westminster*, the Owner first paying or compounding for the Customs, and declaring at what place they will land them before he ships them, and upon Licence had, and in the presence of an Officer they may unlade them; otherwise they incur a forfeiture.

C H A P. XV.

Provisions and Allowances made notwithstanding the several Clauses in the Acts for the Customs

- I. Custom to be paid for no more than is landed; and when Bulk shall be broken.
- II. Of Goods Imported and Exported, what of the Customs shall be repaid back, and by whom; and of the things requisite in the same.
- III. Of Agreement or Contracts made, or to be made for the importing and exporting by way of Composition, ratified.
- IV. What Allowances to be made to the Exporters of Wines.
- V. Of Exporting of Spanish Wooll; where the same may be done.
- VI. Of Currans Exported, what Allowances shall be made, and to whom, as well to Denizens as Foreigners.
- VII. Goods imported not finding Market after a year; Wine exported discharged of Custom.
- VIII. What Allowances are to be made for Leakage.
- IX. What shall be accounted Leakage.
- X. Wines proving unmerchantable, what allowances to be made.
- XI. Tabaccoes receiving detriment or damage in the Importation, what allowances to be made.
- XII. Strangers paying double Subsidy, where they shall pay Double Custom.
- XIII. Of times and places lawful to unlade, and Officers duties then attendant to be sent.
- XIV. York, New-Castle, and Hull Men were Custom-free and for what.
- XV. Exeter and other Welsh Men, what free Subsidies shall be allowed in.
- XVI. Woollen, whether new old, what allowances shall be made in Custom or Subsidy.
- XVII. Allowances of 5. in Hundred for all other Goods.
- XVIII. The Customers and Officers Duties in reference attend their several Duties the Customs.
- XIX. Of Officers their Duties, the Punishment where made complaint.
- XX. The several Duties of London how preserved.
- XXI. The like for other Cities those Duties granted or taken publick good uses.
- XXII. Where Ships may be detained and the Officers duty relating to the same.
- XXIII. Timber to be rated, in what manner must pay.
- XXIV. Prevention in Extension of Customers and Officers and on what pains and penalties.
- XXV. Where Fees for Copies and Certificates shall be paid all together, and where

shall not detain his own Cockeret till the Vessel has broke ground.

XXVI. Where the Officers and Customers shall allow and make good to the Merchants the Algier Duty and all other allowances, and no other Imposition or Duty required by the Book of Rates, shall be required to be paid.

XXVII. If Goods shall happen to

be taken by Enemies or Pirates, or wreck'd, and what allowances shall be paid.

XXVIII. Ships of War and other priviledged Vessels subject to search.

XXIX. Of Allowances to be made, and of shipping out lesser quantities than are contained in the Certificate, what operation the same have.

Every Merchant shall have free Liberty to break Bulk in any Port allowed by Law, and to pay Custom and Subsidy for no more than he shall enter and land; Provided that the Master or Purser of every such Ships shall first make declaration upon Oath before any two Principal Officers of the Port of the true Contents of his Ships lading, and shall likewise after declare upon his Oath, before the Customer, Collector, Comptroller, Surveyor, or any two of them at the next Port of this Kingdom, where his Ship shall arrive, the Quantity and Quality of the Goods landed at the other Port where Bulk was first broken, and to whom they did belong.

A Merchant brought eighty Tun of Bay-Salt by Sea to a Port in England, and out of that Ship sold twenty Tun, and discharged the same into another Ship then riding at the same Port, but the twenty Tun were never actually put on shore, and for the rest, being sixty Tun, the Master agreed for the Customs and Duties to put them on land; and although that that twenty Tun was always water-born, and never were put on shore, yet adjudged they ought to pay; the reason was, for the discharging them out of the Ship, amounts as much as to the laying them on Land, the same being done in Port; for otherwise the King would meerly be defrauded. But if a Ship is carried in by storm, and to preserve the Vessel part is landed before the Duty paid, yet this will not subject the same to a forfeiture.

II. All Foreign Goods and Merchandizes (except wines, Currans, and wrought Silks) first Imported, shall

Vide Cap. 14. What are lawful places of landing.

Col. 12. part fol. 17, 18.

Fogassas's Case Plowden's Com. fol. 9.

shall be again Exported by any *English* Merchant within twelve Months, and such Merchant or Merchants as shall Export any such Foreign Goods or Merchandizes (except as before is excepted) shall have allowance and be repaid by the Officer which received the same, the one moiety of the Subsidy which was paid at the first importation of such Goods or Merchandizes, or any part thereof, so as due proof be first made by Certificate from the Officers of the due Entry and Payment of the Custom and Subsidy of all such Foreign Goods and Merchandizes inwards, with the Oath of the Merchants importing the same, affirming the truth thereof, and the name of his Majesties Searchers, or Under-searcher in the Port of *London*, and of the Searcher of any other the Out-Ports, testifying the shipping thereof to be Exported; after all which duly performed in manner before expressed, the moiety of the Subsidy first paid inwards, shall without any delay or reward be repaid unto such Merchant or Merchants who do export such Goods and Merchandizes, within one Month after demand thereof, as also the whole additional Duty of *Silk, Linen, and Tabacco*, as before is directed.

Lutw. 215,

221.

1 *H.* 7.

* *Hobart* 270.

Rolls Abridg.

599.

If the Officer shall refuse to pay, (admitting there was no relief had by way of complaint) whether the Merchant Exporter may not bring an Action against him upon the Debt created in Law, as he that hath a Tally may do *

III. And if there be any Agreement now in force, which was formerly made by the late Commissioners of the Customs and Subsidies, with the Merchants Strangers or their Factors, or shall hereafter be made by any Commissioners or Farmers of the Customs and Subsidies, or any other Power, (except by consent of Parliament) with any Merchant or Merchants Strangers or Factors for any Foreign Goods and Merchandizes, to be brought into the Port of *London*, or any other Port or Haven of this Kingdom of *England*, or Principality of *Wales*, and to be Exported again by way of Composition; all other Merchants being his Majesties Subjects shall be admitted

mitted into the same Composition, and not be excluded from any other Priviledge whatsoever granted to the Stranger by any private Agreement or Composition, under the same condition and with the same restriction as shall be made with the Merchant Stranger.

IV. Every Merchant as well *English* as Strangers, that shall ship and export any kind of Wines, which formerly have paid all the Duties of Tunnage inwards, shall have paid and allowed unto them all the Duties of Tunnage paid inward, except to the *Englishmen* 20 s. per Tun, and the Stranger 25 s. per Tun; upon due proof of the due Entry and Payment of Tunnage inwards, and of the shipping thereof to be Exported to be made as above.

V. If any Merchant, Denizen, or Stranger shall Export any *Spanish* or Foreign *Wooll*, he shall have liberty so to do with this further Condition, That such *Spanish* or other Foreign *Wools* whatsoever be not Exported in any other Ship or Vessel whatsoever, with intent to be arrived beyond the Seas out of the Kingdom of *England* and Dominion of *Wales*, than only in *English* Shipping, upon pain of Confiscation. 12 Car. 2. c. 32.
14 Car. 2. c. 13.

VI. Every Merchant, as well *English* as Stranger, which shall ship or Export any Currans which formerly were duly entred, and paid the Subsidy and Custom inwards, shall have allowed and repaid unto them respectively all the Custom and Subsidy paid inwards for the same, except 1 s. 6 d. for every Hundred weight to the *English*, and 1 s. 8 d. and one half-penny for every Hundred weight to the Stranger, upon due proof of the due Entry, and payment of the Custom and Subsidy thereof inwards, and of the shipping thereof to be Exported to be made as in the second Article.

VII. If any Merchant having duly paid all Duties inwards for Foreign Goods, and in regard of bad Sale shall be enforced to keep the same, or any part thereof in his hands, after the space of a year shall be elapsed; in this case he or any other Person is to be permitted to ship the same out for parts beyond the

the Seas, if they think fit, without payment for any Subsidy for the same outwards, upon due proof that the same was duly entred, and Subsidy paid inward.

VIII. Every Merchant bringing in any sort of Wine into this Kingdom by way of Merchandize, and shall make due Entries of the same in the Custom-House shall be allowed 12 *per Cent.* for Leakage.

IX. Every Hogthead of Wine which shall be run out, and not full seven inches, shall be accounted for ours, and the Merchant to pay no Subsidy for the same.

*Poyce vers. Cole
sen & Cole jun.
Hill. 27 Car. 2
in B. R.*

And by some its conceived that no Freight shall be paid for the same, but the Merchant may sling them up to the Master for Freight; but that should seem hard, for *non constat* any fault in the Master, but the same may be in the Casks, or in the ill stowing (the Master by Custom having no charge of the stowing of Wines, especially *French*, but the same belongs to certain Officers beyond Seas from whence they are imported) besides the *Goods*, be they empty or full, take up Tunnage in his Ship, and should all the Wines on ship-board have the same misfortune, it would seem hard; however, it is pity Opinion in this case should amount to a laudable Custom.

X. If any Wines shall prove corrupt and unmerchantable, and fit for nothing but to distil into hot Waters or to make Vinegar, then every Owner of such Wines shall be abated in the Subsidy according to such his Damages in those Wines, by the discretion of the Collectors of the Customs and one of the Principal Officers.

XI. If any Tobacco or other Goods or Merchandize brought into this Kingdom shall receive any damage by salt Water or otherwise, so that the Owner thereof shall be prejudiced in the sale of such Goods, the principal Officers of the Custom-house, or any two of them, whereof the Collector for the time being to be one, shall have power to chuse two indifferent Merchants experienced in the values of such Goods, who upon visiting of such Goods, shall certify and declare upon their Corporal Oaths first administered by the said Officers, what damage such

There is a
Book at the
Custom-house,
in which
there is a ge-
neral value set
on all Goods.

Goods

Goods have received, and are lessened in their true value; and according to such damage in relation to the Rates set on them in the Book of Values, the Officers are to make a proportionable abatement unto the Merchant or Owner of the Subsidy due for the same.

XII. All Merchants Strangers who according to the rates and values set in the general Book of Values and Rates, and do pay double Subsidy for Lead, Tin, Woollen Cloth, shall also pay double Custom for Native Manufactures of *Wool*; and the said Strangers are to pay for all other Goods as well inwards as outwards, rated to pay the Subsidy of Poundage, three pence in the pound, or any other Duty payable by *Charta Mercatoria*, besides the Subsidy. Nor can such Merchants Strangers land their Goods before they have agreed for the Customs, notwithstanding *Charta Mercatoria*.

XIII. That the Merchants Trading into the Port of London, have free liberty to lade and unlade their Goods at any lawful Keys and places of shipping and lading Goods between the Tower of London and London Bridge, and between Sun-rising and Sun-setting from the Tenth day of September to the Tenth day of March; and between the hour of six of the Clock in the Morning, and six of the Clock in the Evening, from the Tenth day of March to the Tenth of September, giving notice thereof to the respective Officers appointed to attend the lading and unlading of Goods; and such Officer as shall refuse upon due calling to be present, he shall forfeit for every default 5 l. the one moiety to the King, the other to the Party aggrieved. he suing for the same. * Vide lib. 3. cap. 14. S. 10.

XIV. The Merchants of *Tork, Kingston upon Hull, and New-Castle upon Tyne*, and the Members thereof, shall be allowed free Custom and Subsidy two of the Northern Clothes and Kersies in ten to be shipped in those Ports in the name of *Double Wrappers*, as formerly has been there allowed them.

XV. The Merchants of *Exeter* and other Western parts shall be allowed free of Subsidies one *Perpetanae* in Ten for a *Wrapper*, and three *Devons Dozens* in twenty for *Wrappers*, the same to be shipped out of the Ports of *Exeter, Plymouth, Dartmouth, Barnstable,*

Note, That all these several allowances are not by Act of Parliament, but purely his Majesties gracious and voluntary gift and benignity towards the encouraging the Merchants and Trade.

stable, Lyme Regis, or the Members thereof.

XVI. All Merchants transporting any sort of *Woollen*, whether new or old Drapery, as also all *Bayes* and *Cottons*, shall be allowed one in ten for a *Wrap* per free of Custom and Subsidy.

XVII. Every Merchant shall be allowed upon all other Goods and Merchandize appointed to pay any the Subsidy of Poundage according to the Rate in the Book of Values, to be imported 5 in the Hundred of all the said Subsidies of Poundage so appointed to be paid.

XVIII. The Officers who sit above in the Custom-house of the Port of *London*, shall attend the service of their several places from nine to twelve in the Forenoon, and one Officer, or one able Clerk, shall attend with the Book in the Afternoon, during such time as the Officers are appointed to wait at the Water-side, for the better deciding of all Controversies that may happen concerning Merchants Warrants, all other the Officers of the Out-Ports shall attend every day in the Custom-house of every respective Port for dispatch of Merchants and Ships between the hours of nine and twelve; and two and four in the Afternoon.

XIX. Every Merchant making an Entry of Goods either inwards or outwards, shall be dispatched in such order as he cometh; and if any Officer or Clerk, shall either for favour or reward put any Merchant or his Servant duly attending and making his Entries as aforesaid, to draw any other Reward or Gratuity from him than is limited in the Act of *Tunnage and Poundage*, and the general Book of Values, if the Master Officer be found faulty herein, shall upon complaint to the Chief Officers of the Custom-house be strictly admonished of his Duty; but if the Clerk be found faulty therein, he shall upon complaint to the said chief Officers be presently discharged of his Service, and not permitted to any more in the Custom-house.

XX. The Lord Mayor, Commonalty, and Citizens of the City of *London*, their Officers, or Deputies for and touching Officers of *Package*, *Scavage*, *Bale*

Ballage or *Portage* of any Goods or Merchandize of Aliens, or their Sons born within this Kingdom or Towns, or Freemen, Imported or Exported into or out of the City of London or the Liberties or Ports thereof unto or from the parts beyond the Seas, for or concerning the receiving or taking of any Fee or Rates heretofore usually taken, for or in respect of the said Offices, or any of them, might and may receive and take the same, any thing in the ACT of Tunnage and Poundage, or any other Act or thing to the contrary notwithstanding.

XXI. All ancient Duties heretofore lawfully taken by any City or Town Corporate, their Farmers, Deputies or Officers, under the name of Town-Custom, or the like, for the maintenance, of Bridges, Keys, Harbours, Wharfs, or the like, shall and may be received and enjoyed as formerly, any thing in the said Act, or any other Act to the contrary in anywise notwithstanding.

XXII. The Under-Searcher or other Officers of *Gravesend* have power to visit and search any Ship outward bound, but shall not without just and reasonable cause detain any Ship under colour of searching the Goods therein laden above three Tides after arrival at *Gravesend*, under pain of loss of their Office, and rendering damage to the Merchant and Owner of the Ship, and the Searcher or Officer of the Custom-house in any of the out-Ports having power to search and visit any Ship outward bound, shall not without just and reasonable cause detain such Ship, under colour of searching the Goods therein laden, above one Tide after the said Ship is fully laden and ready to set sail, under pain of loss of the Office of such Offender, and rendering damage to the Merchant and Owner of the Ship.

XXIII. All Timber in Balks which shall be of 8 feet square and upwards, that shall be imported or brought from any part beyond the Seas into the Realm of England, Dominion of Wales, Port and Town of Berwick, or any of them, shall be rated according to the measure of Timber, the foot square for the value thereof, and according to that rate

rate shall pay for Subsidy 12d. in the pound according to Poundage; and all under 8 inches square, and above 5 inches square, shall pay for Subsidy according to the rates mentioned in the Book of Rates for middle Balks, and all of 5 inches square or under, shall pay according to the rate of small Balks.

XXIV. For avoiding of all oppressions by any Officers of the Customs in any Port of this Kingdom in exacting unreasonable Fees from the Merchants by reason of any Entries or otherwise touching the shipping or unshipping of any Goods, Wares or Merchandize, it is ordered that no Officer, Clerk, or other, belonging to any Custom-house whatsoever shall exact, require, or receive any other or greater Fees of any Merchant or other whatsoever, than such as are or shall be established by the Commons in Parliament assembled; and if any Officer or other offend contrary to this Order, he shall forfeit his Office and Place, and be for ever incapable of any Office in the Custom-house.

XXV. All Fees appointed to be paid unto the *Customs*, *Comptroller*, *Surveyor*, or *Surveyor General* in the Port of London, for any Cocquets or Certificate of Goods, shall be paid altogether in one sum, to the Officer from whom the Merchant is to have his Cocquet or Certificate above in the Custom-house; and after the Merchant hath duly paid his Custom and Subsidy, and other Duties above in the Custom-house, as is appointed above by the Book of Rates, he is to be Master of and keep his own Cocquet or Certificate, until he shall ship out his Goods so entered, whereas he is to deliver the same to the *Head Searcher*, or his Majesties *Under Searcher* in the Port of London or other Ports, together with the Mark and Number of his Goods.

XXVI. The Officers of the Custom-house for the time being, shall allow and make unto all Persons all such Monies as are, or shall be due unto them for the half Subsidy, and also the *Algier* Duty of Foreign Goods formerly exported now due and unpaid.

The Duties and Sums of Money appointed to be paid by the Act of Tunnage and Poundage passed

this Parliament, and by the Book of Rates therein mentioned, and no other shall be paid to his Majesties Officers during the continuance of the said Act upon Goods imported and exported, any Law, Statute, or Usage to the contrary notwithstanding. Nevertheless the duty of *Prizage* and *Butlerage*, and the duty of 2 d. of every Chaldron of Sea-coal exported from *New-Castle* upon *Tyne* to any other Port or Ports of this Realm shall be continued.

XXVII. If any Merchant Denizen born shall happen to have his Goods and Merchandize taken by Enemies or Pirates at Sea, or perished in any Ship or Ships, the Duties being either paid or agreed for, upon due proof thereof, may ship out of the same Port the like quantity as shall amount unto the Custom without paying of any thing for the same.

If the Importer shall pay ready Money, he shall be allowed 10 per Cent. for so much as he shall pay down.

XXVIII. Ships of War may be entred and searched for prohibited and unaccustomed Goods, and to bring them ashore to the King's Ware-houses, and the Commissioners or Head-Officers may leave aboard Officers to look after them, that none be unladen or imbezelled, on pain of forfeiture of 100*l.* And if Goods are concealed on shipboard after such time as the Ship is cleared, to forfeit 100*l.* and then any Writ of Assistance out of the Court of Exchequer to go in the day-time to any place, and enter and seize.

Goods conveyed secretly into Ships, and carried away without paying the Subsidy and Duties, the Owners and Proprietors forfeit the double value, except Coals, which only forfeit the double Custom and Duty.

XXIX. There are allowances to be given Merchants for defective and damaged Goods of 5 per Cent. on all Goods imported, and 12 per Cent. on all Wines to be allowed upon Debentures; but if they shall ship out less than is in the Certificate, then the Goods therein mentioned, or the value thereof shall be forfeited, and the Owner or Merchant shall lose the benefit

benefit of receiving back any of the Subsidy: All Goods shipped out are not to be landed again in *England*, on pain of forfeiture of those Goods.

All Goods coming out of, or carried into *Scotland* & *Land*, shall pass through *Berwick* or *Carlisle*, and pay Custom as others, on pain of forfeiture.

And although that by this Act there are many allowances to be made, especially Merchants-Denizen yet the Parliament have ever been so careful as to bound the same, that is, it shall be such who traffic in Ships; (which are indeed the Bulwark of the Isle) and therefore if such Merchandize shall be transported out in any Galley or Carack, they are obliged to pay all manner of Customs, and all manner of Subsidies, as any Alien; but in regard that Herring and Fish are, and have been accounted one of the principal Commodities, and generally find a Vent or Market in those Kingdoms and Countries that usually imploy such sort of Vessels, those Commodities may be Transported in them as well as Ships from any Port or Harbour within this Realm, without paying any Subsidy or Poundage for the same but then such Fish must be taken by the Natives of the Kingdom, and transported by them, otherwise pay as Aliens.

And whereas all manner of *Woollen* Clothes, as well white as coloured, unrowled, unbarded, and unshorn and not fully dressed, are prohibited by Law to be transported, His Majesty was graciously pleased to grant * unto *Frances* Countess of *Portland*, as well for her Alliance in Blood, as also for the many Crosses and Calamities which she hath suffered by the loss and death of her nearest Relations in his Majesty and his Royal Father's Service, full power for one and thirty years, to licence the Transporting of such Goods notwithstanding such prohibitory Laws; the which is now put in Execution by Agreement, and the Composition with her Deputies at the Custom-house.

* Per Letters
Patens bearing
Date
24 of Feb.
27 Car. 2.

C H A P. XVI.

Of the Right of Passage, of imposing on the Persons and Goods of Strangers for passage through the Seas.

Of the Right of harmless Utility excepted tacitly in the primitive Dominion of things.

Where passage ought to be open, and where the same might be implicitly provided for in the first institution of Property, and under what Cautions.

Of the same right in refe-

rence to Goods and Merchandize.

IV. If Passage admitted, whether Tribute or Toll may be imposed.

V. Where Imposition may lawfully be laid, and for what causes; and of the King's Prerogative in that Point.

VI. Whether lawful to stay in others Country, and to build for a season.

HAVING in the foregoing three Chapters observed somewhat of Customs and Impositions laid *facto* within the Realm, and that by Acts of Parliament, or the consent of the three Estates, it may seem amiss to inquire what Imposition the King his Prerogative may impose on Strangers and their Goods passing through his Territories and Seas; and that to inquire of the same in reference to Persons and Goods.

Besides the right of Necessity which seems to be accepted in the first Institution of Dominion, there is another Relique of old Communion, namely, the right of harmless Utility: For why should not one (saith Cic. *de Offic. 1.*) when without his own detriment he may communicate another in those things that are profitable to the Receiver, be to the Giver not chargeable? Therefore Seneca saith, cannot be called a benefit to give leave to another to light *Sen. de Benef. A Symp. 7.* Fire by yours. We read in Plutarch, it is not lawful to spoil our Victuals when we have more than enough, nor to stop, nor hide a Fountain when we have drunk our fill; nor to abolish the Way-marks either Sea or Land which have been useful to us: So a River as a River is proper to that Prince, or that Lord,

*Leg. quadam
D. de rer. di-
vis.*

Lord, or that People, within whose Dominion or Royalty it runs, and they may make a Mill on it, (unless it be common, as a High-way) and may take what Fish the River yields, but the same River as a running water remained common as to drinking or drinking of it, notwithstanding as to the Fishing, and the like, it may be peculiar.

*Bald. 3. conf.
293.*

** Libi. cap. 1.
† S. 3. & 4.
Serv. ad 7.
Æn. littusq;
rogamus inno-
cium, cujus
vindictio, ait.
nulli possit no-
cere.*

*Plutarch re-
lates, That Cy-
mon going to
aid the Lace-
demonians, led
his Army thro-
ugh Corinth,
but being re-
prehended by
the Corinthi-
ans for not as-
king leave of
the City:*

*Nam & qui
fores alienas
pulsat non in-
trat nisi do-
mi permissu:*

*ac vos, inquit, Clioneorum & Magarensium fores non pulsastis sed perfregistis
sentes omnia patere debere plus valentibus. However passage is and must be re-
tained; but in lieu of that, the striking of the Flag, and lowering the Top-Sail
token of that Right due to his Majesty in the British Seas. * Vide lib. I. cap.
Vide Mr. Selden Mare Clausum.*

III. Nor is passage only due to Persons, but to Merchandize also; for no Man hath Right † willfully to obstruct the way of Commerce to any Nation with any other that is remote, because the per-
 † That is, by the Laws of Nature, but the Laws of Nations and those of Countries may;

mission of Trade is for the interest of humane Society, and is not discommodious to any one, and to that purpose Philo speaks: *On the Sea all Ships of burthen safely pass according to that Right of Commerce which between all Nations arising from the desire of natural Society, while they supply one another mutually with what they wanteth, and the other can spare; for envy hath never invaded either the whole World, or the greater parts thereof.* And Plutarch speaking thus of the Sea: *This Element hath made our life sociable and perfect, that otherwise would be wild and without correspondence; it supplies our wants with mutual aids, and by exchange of things needful, it promotes fellowship and friendship.* And the Wisdom of God is highly to be admired, who hath not granted all things to every Land, but hath distributed his Gifts to several Countries, that Men having need of one another, might maintain Society for their common good; therefore hath he endowed Man with Knowledge and Understanding to invent and build Ships, to govern and guide them by those Lamps of Heaven and other Instruments of his Divine Wisdom, enabling thereby the Merchant to convey to all that any place affords: According to that of the

*What Nature any Land denied,
By Navigation is supplied.*

Quomodo autem satis digne quis explicet facilitatem ad mutua commercii nobis datam? Ne enim itinervis longitudo impedimentum aliorum ad alios commensibus adferret, breviorem viam, mare scilicet, ubiq; terrarum disposuit Deus, ad mundum tanquam tenam domum communiter inhabitantes crebro nos invicem inviserimus; Et apud senat a quisque alteri communicans

ipsum, commodè acciperet res apud illum abundantes; ac sic exiguum tenens terrarum, ita tanquam si teneret universam, frueretur eis quæ orbis sunt bonis. Licet tunc tanquam in communi mensa convivarum unicuiq; ea quæ sibi opposita dare longius accumbenti, ac contra quæ apud ipsum sunt accipere manu tantum ex-

But as the Sea is free and open for Traders, yet nevertheless the Passengers are subject to such Restrictions, Laws, and Ordinances, as those Sovereign

M m

Princes

Princes shall make of force in those places where they have an accession of Property or Sovereignty.

*Vide Strabo.
lib. 8. & lib.
16.*

IV. But admitting that such free Passage may be granted, as above, whether Tribute may be imposed by him that rules the Land, upon Merchandise passing by Land or by River, or by part of the Sea, which may be called an Accession of the Land, (that is, the place through which they pass, is as much under the absolute Jurisdiction of the Prince, as the very Land it self) certainly whatsoever Burdens have no relation to the Merchandise, no equity suffices the same to be imposed on the same; neither can Pass-money put on the Inhabitants to sustain the charge of the Common-wealth, be exacted of Passengers.

* 13 H. 4. fol.
14.

V. Nevertheless, if either to secure the Passage of Goods and Vessels from Pirates and others, or the erecting of Beacons, Light-houses, and other Sea-marks, and such like, * there indeed some compensation may be laid upon the Commodities Ships passing through, so that the measure of the cause be not exceeded; or as my Lord Coke observes in the case of the Halage-money, † it be reasonable for upon that depends the justness of Tributes and Toll: And upon those reasons the Venetian in the Adriatick, the King of Denmark in the Baltick does demand the same; and the King of England may do the like in the Chambers of his Empire, and so by his Prerogative; for the same is not so much compulsory to any to pay, but to them that will take the benefit of such accommodation.

† Lib. 3. fol.
63. Case of
the Chamber-
lain of London
Vide the Plea
of the Veneti-
an Lawyers
at the End of
Mr. Selden's
Mare Clausum.

Les Comons prient que lou le Roy les Pre-
nitoys de long temps haut estre Seigneur de la
& ore est venus que le Roy Seigneur des Costes
ambideur parties del Mer, & par ceo prient
Roy de imposer un imposition sur Estrangers
sant purmy la Mer.

*Pereg. lib. 1. de
Jure Fisci,
ap. 1. num. 27.*

Strabo relates, That the Corinthians even from the most ancient of times received Tribute of the Commodities, which to avoid the compassing of Mountains were carried by Land from Sea to Sea. So the Romans received a price for the passage of the River. But this Right of imposing on Ships and Goods

passing through some Territories, is found cruel, especially when they must pass through the Territories of a powerful and fierce People; then it is heavy to the Merchant to compound, for it's often done on hard and grievous terms.

VI. Again, to stay some time for health sake, or for any other just cause, ought also to be permitted to Passengers, for this too is among the innoxious civility; wherefore *Ilioneus* in *Virgil* * when the *Tro-* * *Servius ad eum loc.* was prohibited to stay on the shore of *Africk*, is bold to invoke the Gods as Judges: And the complaint of the *Megarenses* against the *Athenians*, who drove them from their Havens † against common Right, † *Plutarch Pericle.* was approved by the *Greeks*; so that the *Lacedemonians* esteemed no cause to create a War more just: Hence it is, that at this day it is held by all Lawyers, that it is lawful (either in cases of Wreck, or any other exigency upon such landing) for Passengers to build a Cottage or Hut on the Shore to shelter them for a season, though we grant the Shore to be possessed by the Inhabitants: 'Tis true, *Pomponius* does *Occupantis enim est possessio littoris una.* think there ought to be the Prator's Decree; but certainly that extends only to those Passengers that, *de ostenduntur crudeles qui etiam a communibus prohibentur.* being expelled their own Countries, desire perpetual habitation, and a subjection to the Government of the place where they desire to dwell.

The End of the Second Book.

BOOK III.

CHAP. I.

Of Freedom, Bondage, Slavery, Erile, Abjuration.

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| <p>I. Of freedom by the Law of Nature, and of Bondage, Slavery, or Captivity introduced by the Law of Nations.</p> <p>II. Of the Actions that subject Man to Bondage.</p> <p>III. Of the Dominion over Slaves, Bond-men and Captives.</p> <p>IV. Of the Cause, or Reason of such Dominion.</p> <p>V. That this Right or Dominion was not a Law universal.</p> <p>VI. Of Bondage or Slavery, where discontinued by the Christians and Mahometans.</p> | <p>VII. Of a Servitude at the standing with the Law Christian Common wealth.</p> <p>VIII. Of Manumission and dom by the Hebrew and man Law, and by the of England.</p> <p>IX. Of Disfranchising the ral ways.</p> <p>X. Of Abjuration and and what operation it has.</p> <p>XI. Of Freedom in Civil Corporations in reference Merchants, Traders and reigners.</p> |
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L. libert. §. 1. D. I. de statu hominum. Fiunt etiam servi liberi homines captivitate de jure gentium. Braddon l. 1. c. 6.

IN the primitive state of Nature, no Men Servants; yet it is not repugnant to natural Justice, that by the Fact of Man, that is, by his own or Transgression, Servitude should come in; therefore Servitude is brought in by the *Laws of Nature*.

II. Hence it is, That those that will yield up their persons, or promise Servitude, are accounted *Slaves*; so likewise all that are taken in Publick Wars and brought within the Guards of their conquerors; nor is transgression necessary, but the Lot of all is equal after the War is begun, those whose ill fortune subjected them to be apprehended within the Enemies bounds; not they Servants only themselves, but all their Posterity for ever.

Littleton §. 175. l. Postlim. §. 1. D. de Captiv.

III. The Priviledges of this Right or Dominion are infinite; since there is no suffering which may not be imposed on such, nor work which may not every way be extorted from them: So that even the Cruelty of Masters became almost unpunished, till the Municipal Laws of Countries set bounds to their rigour and power.

L. de servorum §. 1. D. ed statu

Apud omnes peraq; gentes, ait Caius Animadvertere possumus dominis servos vita necisq; potestatem fuisse. Co. Instit. fol. 116. b. l. 1. D. de his quid iuri.

Nor are the Persons become theirs only that have the power of them, but also all that they have; for such unhappy Persons can have nothing of their own.

Hence it was, That that excellent Law in favour

of such, was introduced by the Romans, called * *Lex* * *Leg. Cornel. ff.*

cornelia, which was when a Captive, *intra praesidia de Testam. &*

scilicet, died in his Captivity; if he had made a *Leg. Cornel. ff.*

Will, before his being taken Captive, yet such a *de vulg. substit.*

Captive should in favour of such Will, and for the

upholding of the same, be feigned to be dead, and

puncto temporis, immediately before such his being

taken Captive; and so by that Legal Fiction of

death, his Will became firm and valid, as if he had

really died without ever being taken by the Ene-

my. So likewise if one had been made a Slave; yet

he had returned out of his Captivity, that for

the preservation of his Right and Propriety, he

was feigned as if he had never been absent, and

was immediately reintegrated into his pristine state

and condition.

IV. Now all these Privileges and Immunities were

introduced by the *Laws of Nations*, for no other reason,

but that their Captors, taken by so many Immunities,

would willingly abstain from that cruel rigour of slaying

their Prisoner.

Hence it is, That the Captor's Dominion is ex-

tended to the Children; for should such use their high-

Right, they would not be born; but Children that are

born before that calamity, and were never taken Pri-

soners, are freed from that unhappy state.

And Fortescue

conceives, it

began ab homi-

ne, & pro videri

introducitur est

servitus, E. sed

libertas à Deo

homines indita

natura, quare

ipsi ab homine

sublata semper

redire gliscit ut

faciat omne quo libertate naturali privatur, cap. 42.

M m 3

V. Though

Of Freedom, Bondage, Slavery, &c. Book

V. Though this Dominion or Right was generally acquired in most Nations, yet was not the same an *universal Law*; for amongst the *Jews*, refuge granted to Servants who fell into that calamity no fault of their own. And the state of *Christendom* at this day is apparent, That Prisoners taken in War do not become perfect Slaves, as of old, but only remain in the custody of the Captor, till *Ransoms* are paid, whose valuations are generally at the pleasure of the Conqueror; yet Persons of Eminent Quality, as *Generals*, and the like, such persons, * if taken by a common Soldier, yet he has no advantage by the same; for such a Captive is become Prisoner immediately to that Prince or State under whom the Captive served: But if it be the lot of an *inferior Soldier* become a Prisoner of War, he is then become absolutely the Captors to dispose of; but he wants those Necessaries in the Field for himself, which he ought to provide for his Prisoner, commonly without that interest, and generally yields him up as a Prisoner of War to be disposed of by that Prince or State under whom he serves.

* Artic. of War
Anno 1673.
for his Majesties Forces,
Artic. 24.

Bart. in l. nam.
de serv. Di. de
rebus gestis.

In the Wars of
the French
with the Spaniards
in Italy, a Horseman
was ransomed for the
4th of his yearly Pay.
Vide Mariana
l. 27. c. 18.
And in the last
Belgick War, the English
dismissed all the Flemings that
were taken in

VI. Slavery in *Christendom* is now become obsolete and in these latter Ages the minds of Princes and States having as it were universally agreed to esteem the words, *Slaves*, *Bondman*, or *Villain*, barbarous and not to be used; and that such as are taken in War between Christian Princes, should not become Servants, nor be sold, or forced to work, or otherwise subjected to such servile things, but remain till an exchange of Prisoners happen, or a Ransom paid, as amongst the very *Turks* and *Mahometans* at this day generally observe this among themselves, not to make Slaves of those of the *Mahometan Religion*, though taken in War; and that which is most to be admired, a Christian fallen into that miserable state renouncing his Religion, and becoming a *Mahometan*, immediately upon his Circumcision obtains his Freedom with a Recompence. The Cruelty of those Infidels to those unhappy Persons, together with the reward of renouncing, hath given cause to many a brave Person to become *Renegado*; and

wh

which being considered by the Parliament of England, they made a † provision for such miserable Persons as should be taken by *Turkish* and *Moorish* Pirates.

War, as they did the like with those of England.

anno 1675. *Quam non sit ardua virtus servitium fugisse manu*, it is none of the hardest Vertues to embrace Death to avoid Slavery † 16, 17 Car. 2. cap. 24. its inspired; but his Majesty is yet graciously pleased to consider the state of his poor Subjects, and thereupon hath appointed a Committee of the Lords of the Privy-Council, for the managing of that Affair.

VII. Though *Slavery* and *Bondage* are now become *Salk. 656, 667.*

continued in most parts of *Christendom*, and to that degree, that for the Person of a Man, be he *Moor* or other *Indian*, a Trover is not maintainable by the Laws of *England*; yet there may be a Servitude which may amount to a labour or suffering equal to that of Captives, the which may be justifiable; for Men either through poverty, and the * like, may * *The English* oblige themselves by Contract for maintenance to Merchants and others, at the *Canaries*, Servitude that's perpetual, *i. e.* for life, and so for years; but at this day there is no Contract of the do here super-
Ancestor can oblige his Posterity to an hereditary port this unna-
service; nor can such as accept those Servants, ex- tural Custom:
ercise the ancient Right or Dominion over them, *So likewise at*
no nor so much as to use an extraordinary rigour, other Plan-
without subjecting themselves to the Law. If an tions:
Eye or a Tooth had been struck out injuriously, by *Exod. 21. 26.*
the *Hebrew Law* Freedom was immediately due; and 27.
by the *Greeks*, if Servants had been ill treated, it was
lawful for them to demand a sale of themselves to
others. At *Rome* the Statutes became Sanctuaries for
Servants to implore the help of the Governours a-
gainst rigour, hunger, or any other intolerable in-
jury inflicted by their Masters; and even in *London* at *Vide the Sta-*
this day in *Servitude* (amongst the many causes, as tute of 3 *Eliz.*
not Inrollment of the Indentures, not instructing in who hath pro-
the Art, want of Necessaries, *infra statem* 14, &c.) vided the like
Cruelty, Hunger, Rigour, immoderate Correction, remedy in o-
and the like, are causes sufficient on a *Monstrance* or ther places,
Petition to the Lord Mayor and Aldermen to dis-
solve the Contract, though under Hand and Seal,
and to decree all or part of the Dowry, or some
given (if any) to the Servant; and if cruelty hath
been

been in the case, to expose the Master to answer & make amage to the party Servant.

VIII. *Ulpianus* observes after, That by the Law of Nations Servitude came in, then followed the benefit of Manumission. By the *Hebrew Law*, after the expiration of the time agreed on, the Servant was to be manumitted, and that not without Gift like *London's Freedom*; by the Custom of which the Master is always at the charge of Cloathing, and discharging the Chamberlain's Fees. By the *Roman Law*, every Son was in such subjection to his Father

Deut. 15. 13. that before he could be released of this Subjection and made Free, he should by an imaginary sale be sold three times by his natural Father to another Man, who was called by the Lawyers *Pater Fiduciarius*, that is, a Father in Trust, and then be bought again by his natural Father, and so manumitted him, and then he became Free: This Form of selling Free was by them called *Emancipatio* & Freedom thereupon they called themselves by a new name, *Slave*, which is in their Language, *Glorious*; but in after time, (that warmer Climate having thawed the Northern hardness, and not ripened their Wits) when they were conquered, *Italians* in derision call them (being then their Bond-men) *Slaves*, Sir *Walter Rawleigh*, lib. 2 cap. 17. §. 8.

Vide leg. 12.

Tabul. Sigonius de jure Roman.

**Justin. Instit. lib. 1 tit. de In-*

gen. Vid. Franc. Silo in Catilin

art. 4.

That *Roman Darling* was to be obtained three ways

1. By *Birth*, *both, or at least one of their Parents being Free, and such were called *Cives Originarii*.

2. By *Gift and Cooptation*, when the Freedom was bestowed on any Stranger or Nation, and then they were termed *Civitati Donati*: And so we read that *Cæsar* took in whole Nations into the Freedom.

Lastly, by *Manumission*, which was thus: When the Servant was presented by his Master before the *Consul* or *Prætor*, the Master laying his hand upon the Servant's Head, used this form of words, *Hunc liberum esse volo*; and with that turning his Servant round and giving him a Cuff on the Ear, he did emit the *servum è manu*: The *Prætor* laying then a certain Wand or Rod, called *Vindicta*, upon the Servant's head, replied in this manner, *Dico eum liberum esse* & *re Queritum*, then the *Lictor* or *Serjeant* taking the

Goodwyn Antiqu. Rom. 4.

33, 34.

Wand, did strike the Servant on the head, and with his hand struck him on the face, and gave him a push on the back; and after this he was Registered for a *Free-man*. This being performed, the Servant having his head shaven purposely at that time, received a Cap as a Token of Liberty.

Tertullian observes, that at this time of their Manumission, the Servants received from their Masters a white Garment, a Gold Ring, and a new Name added to their former. *Tertullian. de resur. Carn.*

By the *Laws of England* every Subject born within the King's Dominions, is a *Freeman* of this Realm, as appears by the *Grand Charter*, cap. 14. yea, though he be a *Bond-slave* to a Subject: † But a *Stranger* born is no *Freeman*, till the King have made him a *Denizen*, in whose power alone, without the help of any other, one may be made Free. *Magna Charta cap. 14. † As to some things vide postea §. 9.*

To be a *Freeman* of the Realm, the place of Birth, is held more considerable than the Quality of the Person; yet by the Opinion of *Hussey* Chief Justice, and in *Calvin's Case* of the *Post-Nati*, it is held for Law, That if *Ambassadors* of this Realm have Children born in *France*, or elsewhere, the Father and Mother being natural born Subjects, the Children are Free of the Realm of *England*: But if either the Father or Mother of such Children were an *Alien*, then are not those Children Free. *1 Rich. 3 fol. 4*

But the Law is conceived to be otherwise at this day. The Statute *de Natis ultra mare*, 25 E. 3. declares the Issue born of an *English* Man upon an *English* Woman, shall be a *Denizen*; for upon the construction of this Statute it has been adjudged more than once, that if an *English* Man marry a *Foreigner*, and has Issue by her born beyond Seas, the Issue is a *Natural born Subject*. *Bacon's Case, 1. Cro. 601. St. 2. cap. 9.*

If Baron and Feme *English* go beyond Sea without Licence, or tarry there after the Time limited by the Licence, and have Issue, that the Issue is an *Alien*, and not Inheritable, contrary to the Opinion of *Hussey*, 1 R. 3. 4. Hide against *Hill*. 3 Cro. 3. 1 Cro. 602. *Steven's Case*, cited in *Bacon's Case*.

An

English Merchant marries an Alien, and has Issue, he is not Alien.

Curiam.

Of Freedom, Bondage, Slavery, &c. Book II

An *English Merchant* had Issue by a *Polish Woman* in *Poland*, and Devises his Copy-hold Land to the use of his Children, *per Crook*, The Children are not Aliens. 1. Because the Father went with Licence being a Merchant. 2. In our Law, *Partus non sequitur Ventrem*. 3. Blood is between him and his Issue. Several of the Judges held that the Words in the Stat. 25. Ed. 3. cap. De natis ultra mare, whose Father or Mothers be or shall be of the Allegiance of our King, shall be taken distributive, Father or Mother and not Copulative, *Littleton's Rep.* 23, 26, 27. The King against *Eaton*.

IX. *Disfranchising* by the *Romans*, called *Capitis diminutio*, was threefold, *Maxima*, *Media*, and *Minima* the least degree was, when the *Censors* pulled a Man from a higher Tribe down to a lower, and less Honourable; or when by any *Censure* they disabled a Man from suffraging or giving his Voice in the public Assemblies; such as were thus in the last manner punished, were termed *Aerarii*, and in *arario veluti*, quia omnia alia jura Civium Romanorum præterquam tributi & aris conferendi amiserunt. *Gellius* relates

A. Gellius No. 2. That *P. Scipio Nasica* and *M. Pomilius*, being *Censors* *Artic. 3. c. 17.* taking a view of the *Roman Knights*, observed one of them to be mounted on a lean starvling Horse, himself being exceeding fat; whereupon they demanded the reason, why his Horse was so lean, himself being so fat? His Answer was, *Quoniam ego, inquit, mæcuro; equum verò servus.*

First granted
17 Job. Reg.
revived 9 H. 3.
and since confirmed above
thirty times.

By the Ancient Laws of *England*, and by the *Great Charter*, no *Freeman* shall be taken or imprisoned, but by the lawful Judgment of his Peers (that is, by Jury, Peers for Peers, ordinary Juries for others who are their Peers) or by the Law of the Land; which is always understood by due process of the Law, and not the Law of the Land generally; for otherwise that would comprehend Bondmen, (whom we call Villains) who are excluded by the word *Liber*; for such Bondman might be imprisoned at the pleasure of his Lord, but a Freeman neither could nor can, without a just cause, nor does the Priviledge extend to private Actions.

or Suits between Subject and Subject, but even between the Sovereign and the Subject. Hence it is, that if a Peer of the Realm be Arraigned at the Suit of the King for a Murder, he shall be tryed by his * Peers, that is, by the Nobles. But if he be * The Lord appealed of Murder upon the prosecution of a Subject, his Tryal shall be by an ordinary Jury of twelve *Monteagle's* Freeholders; and as the *Grand Charter* did, and does *Case for the supposed Murder of one Hastings, 15 Car. 2. 10 E. 4. 6. 33 Hen. 8.* protect the Persons of Freemen, so likewise their Free-hold: For by the same *Charter* it is declared, That the King, or his Ministers, shall out no Man of his Free-hold without reasonable Judgment; and so it was rul'd upon a Petition in Parliament, set-*Bro. title, Tryals.* ting forth, that a Writ under the Privy Seal, went to the Guardian of the Great Seal, to cause Lands to be seized into the King's Hands, and that thereupon a Writ issued forth to the Escheater, to seize against the form of the *Great Charter*; upon debate *8 Ed. 3. Rot. Parl. m. 7.* of which, the Party had Judgment to be restored: The greatest and most Explanatory Act, which succeeded in point of Confirmation, was that of *Edward 28 E. 3. cap. 3.* the Third, the words are, **That no Man of what Estate or Condition soever he be, shall be put out of the Lands and Tenements, nor taken or imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of the Law, that is, by the Common Law.**

2. *Diminutio media*, was an Exilement out of the City, without the loss of ones Freedom; the words of the Judgment or Sentence were, *Tibi aqua & igni interdico.*

3. *Diminutio maxima*, was the loss both of the City and the Freedom, and by his Judgment or Sentence was obliged and limited to one peculiar Country, all other places in general being forbidden him.

There was a fourth kind of Banishment, Disfranchising, called *Relegatio*; which was the Exilement only for a season, as that of *Ovid's*,

*Adde quod edictum quamvis immite minaxque,
Attamen in pœna nomine lene fuit:
Quippe relegatus, non exul dicor in illo.*

*Ovid. de Trist.
lib. 2.*

The

The Laws of *England* in this matter have some resemblance with those of the *Romans*; for *Bracton*, observes four Distinctions.

In *London* the same is done by exhibiting an Information in the name of the Common Sergeant, in the Mayors Court there against any Citizen that shall justly deserve so great a dishonour.

* 17 Car. 2. c. 2.

Mr. Selden observes, That in the time of *K. Hen.* the First, and of other Kings, both before and after him, that if any man accused of a Capital crime done

at Sea, being publickly called Five times by the Voice of the Cryer, after so many several days assigned did not make his appearance in the Court of Admiralty, he was banished out of *England*; & de mere appartenant au Royd' Angles for forty years more or less, according to his offence. *Mar. Claus. fol. 12.*

1. *Specialis, hoc est, interdictio talis Provincia, Civitatis, Burgi aut Villa.*

2. *Generalis, Interdictio totius Regni, & aliquando eff*

3. *Temporaria, pro duobus, tribus, quatuor, aut pluribus annis, aut; &c.* —

4. *Perpetua, pro termino vitæ, & exilium est aliquando ex arbitrio Principis, sicut in exiliando Duces Hertfordia & Norfolciæ, per Regem Richardum Secundum, & aliquando per Judicium Terræ, ut fit in casu Piers de Gavellton, & etiam in casu Hugonis de le Spencer Junioris, quambo fuerunt exiliat per Judicium in Parlamento.* So likewise was that of the Banishment of the Earl of *Clarendon*, who dyed beyond Sea *.

X. *Abjuration* was also a Legal Exile, by the Judgment of the *Common Law*, as also by the Statute Law and in the Statute of *Westm. the second, cap. 35.* he that Ravishes a Ward, and cannot render the Ward unmarried, or the value of his Marriage, must abjure the Realm; and this is a general Exile. And by the Statute made 31 *Ed. 1.* Butchers are to be abjured the Town, if they offend the fourth time, in selling meazled Flesh and this is a special Banishment.

A Man Exil'd does forfeit these things.

1. He loseth thereby the Freedom and Liberty of the Nation out of which he is Exiled.

2. He forfeits his Freedom in the Borough or City where he was free; for he which forfeits the Freedom of the whole Realm, forfeits his Freedom in every part.

24 E. 1. 1 H. 4.

2 Bulst. 182.

1 Inst. 132.

133.

15 E. 3. 5th.

petition pl. 2.

3. The Law accounts him as one dead; for his Heir may enter, and so may his Wife enter into her own Lands, and may sue an Action as a *Feme sole*.

4. He shall forfeit those Lands which he shall purchase in the Realm, during his Banishment; for he d

ring his Banishment is as much disabled to purchase as an Alien; for *fit alienigena* by his Banishment, and he is observed to be in a worse condition than an Alien; for he is marked with *indignatio Principis*. 'Tis true, he cannot forfeit neither Title of Honour, or Knight-hood, nor the Lands he had before Exile, unless there be special Sentence or Judgment, as that of [the *Spencers*]. * *Totles Magna Charta, fol. 50, 51.*

If the Father be in Exile, this hinders not the Freedom of the Son, for the same is not a thing descendible; for should it be so, then the Banishment of the Father would make a Forfeiture of the Freedom; but the Son has this Freedom by his own Birth, as a purchase, and not by the death of his Father by descent: Like the Case where *J. S.* hath many Children, and then he confesseth himself a Villain to *J. D.* in a Court of Record; yet his Children formerly born are Freemen, and no Villains; the reason is, because they were free by their own Births; but the Inheritance is intralld, because it is to come to the Heir by descent.

XI. A Freeman of a City or Borough may be made divers ways, as my Lord Coke observes, *8 R. fol. 126. Case City of London.*

1. By Service.
2. By Birth, by being the Son of a Free-man.
3. By Purchase or Redemption.
4. At *Bristol* by Marriage.

Sir *John Davies* in his *Irish Reports* observes the same for Law. *St. Paul* was born at *Tarsus* in *Cilicia*, which was under the Obedience of the *Romans*, by virtue of which he challenged the privilege of a *Roman Citizen*; but it was accounted no more than a *National Freedom*; like that of *Calvin*, who claimed the general Freedom of an *Englishman*, being born in *Scotland*, but under the Obedience of the King of *England*; but that challenge made not *St. Paul* free of the private Customs, Privileges, and Franchises of *Rome*, no more than *Calvin's* Birth made him a free Citizen of *London*, to the particular Customs of that City.

The

King Edward
the 3d grant-
ed to John
Falconer de

The King, by his Letters Patents, cannot make one a Free-man of London, * yet he may thereby make him a Free-man of his Kingdom.

Luca, an Apothecary of the City of London, quod ipse omnibus libertatibus quibus Civitatis predictæ habent in eadem Civitate alibi infra Regnum Angl' nostrum habeat, gaudeat & utatur, &c. Rot. Pat. 32 E. 3. in the Tower; yet it was held That this Grant did not make him a Free-man of the City, for it cannot be attained but by one of those ways. * Case of the City of London, Co. 8. Report.

If one born in a City, of Parents that are not Free, the Child hereby is no Citizen by Birth; and if one be born of Free Parents out of the Place of Privileges, as London, &c. he yet is a Free-man by Birth; yet in the Charter granted to Tarmouth, the words were, *Concessimus Burgenfibus de Magna Yarmoutha de villa predictæ oriundis*, that they should have such Liberties: So that special words may alter the Case.

Confirmed by
Magna Charta
cap. 9.
Rot. Parl. 7 R.
num. 37.

London had many Royal Franchises granted therefrom time to time, and were often by former Kings successively confirmed, nor wanted they a share when the great Charter was granted, to have their ancient Liberties secured; nor were the succeeding Princes slack in their Royal Grants and Confirmations; but especially Richard II. Who in Parliament granted and confirmed to them all their ancient Customs and Liberties, with this Clause, *Licet usi non fuerint ut abusi fuerint*; and notwithstanding any Statute to the contrary, amongst the Number of their many Privileges, the Freedom of the same was accounted of no small Importance, since in divers Parliaments it was very much aimed at, and endeavoured to be impaired; but at last they obtained a most gracious and Royal Confirmation in Parliament of their ancient Liberties, amongst which it is declared, That no Merchant being a Stranger to the Liberty of the said City, should sell any Commodities within the Liberty of the said City, to other Merchant-Strangers; nor that any such Merchant-Stranger should buy of any other Merchant-Stranger such Merchandize within the Liberty of the said City, without Forfeiture thereof, saving that any Person, Lord, Knight

9 E. 2. cap. 2.
29 E. 3. cap. 2.
27 E. 3. cap. 11.
7 H. 4. cap. 1.

9 H. 4. this
Act is not
printed.

Uc. may buy within the Liberties of any Merchant Stranger Merchandizes in gross for their own use, so that they do not sell them again to buy any other.

And as this City by Custom may preclude any Person not being free of the same, to sell in such manner upon

such pain; (a) So any other City, which are Bo-

roughs or Cities by Prescription within this Realm,

may have the like Custom, and the Goods sold or

bought by such, may be subjected to Forfeiture, but

the same cannot be good by Charter or Grant.

8 Co. 125. a.

A compleat Freeman is such a one as hath challen-

ged his Freedom, and taken the Free-man's Oath,

and is admitted into the Society and Fellowship of

the Free-men, Citizens, and Burgeffes, otherwise,

he hath but a bare right to his Freedom.

(a) *Vide Salk;*
204. where
'tis held that
such Custom
is an Injury to
the Party, and
a Prejudice to
the Publick.

James Baggs,
Co. 11. Rep.

CHAP.

C H A P. II.

Of Aliens, as in relation to their Estates Real and Personal.

I. Of an Alien his ability and disability in the taking and enjoying of Estates Real and Personal.

II. Of his capacity in purchasing, and disability to transfer by an hereditary descent.

III. Of the Rules of descents, according to the Laws of several Countries.

IV. Of descents according to the rules of the Common Law of England, lineal and collateral.

V. Of Impediments in one that is not the medius antecessor.

VI. Of Impediments in one that is the medius antecessor lineal and collateral.

VII. Of the Statute of Natis

ultra Mare, and Issues born beyond Seas.

VIII. The Lord Coke's Opinion, that if an Alien has Issue two Sons Denizens, the one purchases Land, and dies, the other cannot inherit them, but is barred and refused.

IX. Of Foreign Births which do not create a disability.

X. Of Aliens not disabled by Law to bring either real or personal Actions.

XI. Of Office that must entitle the King to an Aliens Estate.

XII. Of some particular Immunities, and other matters relating to an Alien.

7 Co. 16. 3.

I. **A**N Alien is one born in a strange Country, under the obedience of a strange Prince and State, and out of the Legiance of the King of England, and can have no real or personal Action for, or concerning Lands; and therefore if he purchase Lands, Tenements, or Hereditaments, to him and his Heir, albeit he can have no Heir, yet he is of capacity to take a Fee-simple, but not to hold; for the King upon Office found shall have it by his Prerogative.

So it is if he purchase Lands and dies, the Law doth cast the Freehold and Inheritance upon the King.

1 Inst. 2. b.

1 Inst. 2. b.

But if he purchase or take a Lease for years of a House or a Ware-house, which is for the accommodating him as a Merchant-Stranger, whose Prince or State is in League with ours, there he may hold the same for that the same is incident to Commerce.

1 Inst. 2. b.

And in that case if he departs and relinquishes the

Real

ook III.

realm, the King shall have the same, so it is, if he
no Merchant.

The like Law is, if he takes a Lease of Meadows, ^{Pasch. 29 Eliz.}
lands, Woods or Pastures, the King shall have the ^{Sir James}
same; for the Law provides him nothing but a ^{Crofts Case by} *Habita-*
tion to Trade and Traffick in as a Merchant. ^{the Judges}

II. Though he may take by purchase by his own ^{Ven. 417.}
contract, that which he cannot retain against the
King, yet the Law will not enable him by an Act of
his own to transfer by hereditary descent (the A-
lien dying, his issue a *Denizen* born) the Land will
not descend, or to take by an *Act in Law*; for the
Law *Qua nihil facit frustra*, will not give him an In-
heritance or Freehold by an Act in Law, for he can-
not keep it.

Therefore the Law } 1. By Descent.
will not give him } 2. By Courtesie.
} 3. By Dower.
} 4. By Guardianship.

And in respect of that incapacity he resembles a
Person *Attaint*, but with this difference.

The Law looks upon a Person *Attaint* as one that it ^{Vide Inst. 8. 2}
takes notice of, and therefore the eldest Son attainted
surviving the Father, though he shall not take by
descent in respect of his disability, yet he shall hin-
der the descent to the younger.

But if the eldest Son be an *Alien*, the Law takes ^{32 Ed. 3.}
no notice of him, and therefore as he shall not take by ^{Cozinage.}
descent, so he shall not impede the descent to the ^{Croft Jac. 539.}
younger Brother: As for instance, If there be three ^{Dr. & St. Di.}
Brothers, the eldest an *Alien*, the other two natu-
ralized, and the middle Brother purchase, and dies
without issue, the younger Brother shall have the
lands. ^{1. c. 7.}

III. Concerning the Rule of Descents, we are
not to govern our selves therein by the general no-
tions of *Love* or *Proximity of Nature*, but by the Mu-
icipal Laws of the Country wherein the question a-
rises; for the various Laws of divers Countries have
variously disposed the manner of descents, even in
the same line and degree of Proximity: For instance,
The Father certainly is as near of kin to the Son, as

the Son is to the Father, and is nearer in Proximity than a Brother, and therefore shall be preferred next of kin in administration to the Son's Estate.

According to the *Jews*, for want of issue of Son, the Father succeeds, excluding the Brother and that hath been the use and construction of *Jewish Doctors* upon *Numb. 27. 9.* but the Mother wholly excluded.

*Seld. de successi-
onibus apud
Hebraeos, cap.
20.*

2. According to the provision of the *Greeks* for succession or exclusion of the Father, is left doubtful.

*Comment on
Littleton, fo.
10. 8. tit. 1. de
haredibus ab
intestato veni-
entibus.*

3. By the *Roman* or *Civil Law*, according to the emanation of the *twelve Tables*, the Father succeeded in the purchase of the Son for want of issue of the Son under the title *proximit agnato*, and so was the Uncle but my *Lord Coke* supposes the contrary.

*Goodwyn An-
tiq. de testa-
mentis, fo. 233.
Customs Nor-
mand. c. af-
scheancres.*

But taking the whole Institution of *Justinian*, Son dying without issue, his Brothers, Sisters, Father or Mother do succeed him as well to Land as Goods as a kind of *Coparcenary*.

4. According to the Laws of *Normandy*, (which in some things have a cognition with our Law) his Brothers are preferred before the Father, (if the Son issueless) but his Father before his Uncle.

Lit. §. 3.

5. According to the Laws of *England* the Sons living *sans* issue, or Brothers, or Sisters, the Father do not succeed, but it descends to the Uncle.

1 Inst. 10. a. b.

IV. There be two kinds of Descent, according to the *Common Laws* of this Realm.

1. *Lineal*, from the Father or Grandfather to the Grand-son.

2. *Collateral* or *transversed*, as from Brother to Sister, Uncle to Nephew, and *converso*: And these again of two sorts.

1. *Immediate*, as in lineals from Father to Son.

2. *Mediate*, as in lineals from Grandfather to Grand-child, where the Father dying in the life-time of the Grandfather, is the *medium differens* of the descent.

*Grotius de Jure
Belli ac Pacis
lib. 2. cap. 7.*

Collateral, as in lineal, from Uncle to Nephew and *converso*.

And this mediate Descent, or mediate Ancestry though to many purposes it be immediate; for

Father dying in the life of the Grandfather, the Son succeeds in point of descent in the Lands immediately to the Grandfather; and in a Writ of *Entry* shall be supposed to be in by the Grandfather, and not in the *posſ & cui*.

This is called a Mediate Descent, because the Father is the *medium* through whom the Son derives his title to the Grandfather.

In immediate Descents there can be no impediment, but what arises in the Parties themselves: For instance, the Father seized of Lands, the impediment that hinders the descent must be in the Father or Son, as if either of them be attaint or an Alien.

In mediate Descents, a disability of being an Alien or Attaint, in him that is called the *medius antecessor*, will disable a Person to take by descent, though he himself have no such disability.

In Lineal Descents, if the Father be Attaint or an Alien, and hath issue a *Denizen* born, and die in the life-time of the Grandfather, the Grandfather dies seized, the Son shall not take, but the Land shall *escheat*.

In Collateral Descents, *A.* and *B.* Brothers, *A.* is an Alien or Attaint, has issue *C.* a *Denizen* born, *B.* purchases Lands and dies without issue, *C.* shall not inherit, because *A.* which was the *medius antecessor* or *medium differens*, is incapable. Dyer, 274.
Graves Case.

V. But in any Descents, the impediment in an Antecessor that is not *medius antecessor*, from whom and to whom, will not impede the descent.

As for instance, The Grandfather and Grandmother both Aliens, or attaint of Treason have issue, the Father a *Denizen*, who hath issue the Son a natural born Subject, the Father purchases Lands, and dies, the Son shall be Heir to the Father, notwithstanding the disability of the Grandfather, (and yet all the blood which the Father hath is derived from his disabled Parents) for they are not *medii antecessores*, between the Father and the Son, but paramount. Courtney's case
Common
Pleas Corob.
fol. 141.

The Law does not hinder, but that an Alien is of the same degree and relation of consanguinity, as natural born Subjects or *Denizens* born, the Son, the Father and Brother

Mich. 1 Car.
Cro. 1 Part. 8, 9.
Caroon's Case.

ther though Aliens; the Son, Father and Brother of Law takes notice of as well as natural born Subjects, so it was adjudged, for he shall be preferred in Administration, though an Alien, as next of kin.

29 Ed. 3. tit.
Cozenage 5.

But in cases of *Inheritance* the Law takes no notice of him, and therefore as he shall not take by descent, he shall not *impede* the descent to the younger Brother: As for instance, *A*, an Alien, *B* and *C* naturalized by Act of Parliament, (Brothers) *B* purchases Lands, and dies *sine prole*, *C* shall inherit, not *A*.

Ramsay's Case,
15 Car. 2. in
Com. Banc.

A, an Alien, *B* and *C* his Brothers, both naturalized by Act of Parliament, *B* purchases Lands, dies without issue, the same shall not come to *A* to his issue, though a Denizen, but shall come to *C* and his issue; the Law taking no notice of *A* as to *impede* the succession of *C* or his issue, though it was a *consequential disability* to bar the issue of *A* parallel to what the Law calls *Corruption of Blood*, which is consequent of Attainder.

VI. Again, in Lineal Descents, if there be Grandfather a natural born Subject, the Father an Alien, Son natural born Subject, the Father is not a Denizen, he shall not inherit the Grandfather; if the Father dies in the life of the Grandfather, Grand-child, though born after the Denization, shall not remove neither the Personal nor Consequential impediments or incapacity of the Father.

Godfrey and
Dixon's Case.
Hill. 16 Jac.
in B. R. God-
bolt, 275, 2. Cro
539. 2 Rolls
Rep. 92. Vaug-
han 285. Le-
vins 59.

In Collateral Descents, the Father a natural Subject has issue two Sons Aliens, who are both Denizens, and dies without issue, the other shall inherit him.

A, an Alien marries an *English* Woman, who is seized of Lands and has issue, the Father and Mother yet the issue may inherit the Mother, notwithstanding the incapacity of the Father being an Alien.

De Natis ultra
Mare, 25 Ed. 3.
Cro. Car. 601.

VII. The Statute *de Natis ultra Mare*, declares issue born of an *Englishman* upon an *English* Woman shall be a Denizen; yet the construction has been that though an *English* Merchant marry a Foreigner, has issue by her born beyond the Seas, that issue shall be a natural born Subject.

Book III.

But if an *English* Woman go beyond the Sea, and there marry an Alien, and have issue beyond the Sea, that issue are Aliens. 16 Car. 2. Cr.
601. Bacon's
Case.

If an *English* Woman marries an Alien beyond the Seas, and then comes into *England* and has issue, they are not Aliens, but may inherit. Prowdes Case
of Kent.

VIII. My Lord Coke in his *Commentaries on Littleton*, seems to be of Opinion, That if an Alien has issue two sons born in *England*, one dying without issue, the other shall not inherit him. But the Law is otherwise taken at this day, as I conceive the reasons that have been given, are, Com. Lit. fol. 8.
1 Lev. 60.
1 Sid. 198.
1 Ven. 429.
Hard. 224.

I. Though the descent from one Brother to another Brother be a *collateral descent*, yet it is an *immediate descent*, and consequently if no disability or impediment can be found in them, no impediment in another Ancestor will hinder the descent between them, Per. L. C. J.
Hales in Ram-
sey's Case.

That this is an Immediate Descent appears, First, In point of pleading, one Brother shall describe himself as Heir to another, without mentioning any other Ancestor.

Secondly, According to the computation of Degrees, Brother and Brother make but one degree, and the Brother is distant from his Brother or Sister in the first degree of Consanguinity and no more, by the Laws of *England*.

According to the *Civil Law* * Brother and Brother make but one degree, for the Brother is in the second degree from the Brother, yet both make but one degree. * Just. l. 9. tit.
de gradibus.
consanguinita-
tis 38.
† Decret. Gra-
tiani, cap. 35.
quest. 5.

According to the *Canon Law* † *Frater & Frater*, or *Frater & Soror sunt in primo gradu*.

And therefore the Laws prohibiting Marriage between Kindred in the fourth degree, take Brother and Sister to be the first degree of the four.

The Laws of *England* in computation of the degrees of Consanguinity agree with the *Canon Law*, and reckons the Brother and Brother to be the first degree. Lit. Sect. 20.
31 Ed. 3. Gard.
116.
Holland's Case
cited by Lit-
tleton.

Herewith agree the Customs of *Normandy* * which, though in some cases differ from the Laws of *England*,

* *Servien in*
Compres, de-
grees in line
Collat. *Solenk*
Gr.

Brown's Case,
Mich. 1656.

B. R. contra
5 E. 6. Bro.

Administrati-
on 47. which

prefers the
Brother of

the half blood
before the

Mother.

yet herein, and in divers other particulars touching descents, they agree.

Another Evidence to prove that the descent between Brothers is immediate, is this, (*viz.*) the descent between Brothers differs from all other collateral descents whatsoever, for in other descents collateral *the half blood does inherit*, but in a descent between Brother *the half blood does impede the descent*, which argues that the descent is immediate.

The Uncle of the part of the Father has no more of the blood of the Mother than the Brother by the second venter, the Brother by the second venter has the immediate blood of the Father with the Uncle (*viz.* the Father's Brother) has not but only as they meet in the Grandfather; the Brother of the half Blood is nearer of Blood than the Uncle, and therefore shall be preferred in *Administration*.

It is apparent, that if in the line between Brother and Brother, the Law takes notice how the Father was the *medium* thereof, the Brother of the second venter should rather succeed to the other Brother because he is Heir to the Father; therefore in descent between Brothers the Law respects only the *immediate relation of the Brothers as Brothers*, and not in respect of the Father, though it is true, the foundation of their Consanguinity, is in their Father or Mother.

Again, if the Father, in case of a descent between Brothers, were such an Ancestor as the Law looks upon as the *medium* that derives the descent from the one Brother to the other, then the Attainder of the Father would hinder the descent between the Brothers: But the Attainder of the Father does not hinder the descent between the Brothers; the reason is because *the Father is not such a medium or nexus* that is looked upon by the Law, as the means deriving such a descent between the two Brothers: As for instance of three cases, two whereof evince the first proposition, (*viz.*)

That although the descent from one Brother to another Brother, though it be a collateral descent yet is an immediate descent, and that if no disability impedes

1 Inst. 2. 2.

Book III.

impediment arises in them, no impediment in another Ancestor will hinder them.

The younger Brother has issue, and is attainted of Treason and dyes, the elder Brother has Title to a *Petition of Right*, dies *sans* issue without a restitution, the younger Brothers Son has lost that Title; for though the Title were in the Ancestor that was not attaint, yet his Father that is the *medium* whereby he must convey that title was attaint, and so the descent was obstructed.

Henry Courtney had issue Edward, and was attainted of Treason and dyed, Edward purchased Lands and died without issue, the Sisters and Heirs of Henry were disabled to inherit Edward; yet neither Edward nor his Aunts were attainted, or their blood corrupted; yet because Henry was the *medium through whom* the Aunts must derive their Pedigree and Consanguinity to Edward, who was attainted, the descent was obstructed till a restitution in blood.

But if the Grandfather of Edward had been attainted, and not Henry, this would not have hindred the descent from Edward to the Aunts, because that Attainder had been paramount that Consanguinity which was between Henry and his Sister, and that is proved by this third case.

William Hobby had issue Philip and Mary, and was attainted of Treason and dyed, Philip purchases Lands and dyed without issue; it was adjudged in that case, that *non obstante* the Attainder of William Hobby, Mary should inherit, because the descent and pedigree between Philip and Mary was immediate, and the Law regards not the disability of the Father.

If the Heir of the part of the Father be attaint, the Land shall escheat, and shall never descend to the Heir of the part of the Mother; but if the Son purchase Lands, and has no kindred of the part of the Father but an Alien, it shall descend to the Heirs of the part of the Mother.

9. Those that are born *sub fide, legiantia, obedientia Domini Regis* are not Aliens; and therefore those that were born in *Gascogn, Normandy, Aquitain, Tour-nay, Callice, Guyan*, whilst they were under the Do-

N n 4

minion

10 Eliz. Dyer's
247. Grayes
Case.

Com. placit. Co-
ron. fol. 241.
Henry Court-
ney's Case.

Mich. 40. 41
Eliz. ruled in
the Exche-
quer in the
Case of Hobby.

49 E. 3. 12.
per Tankard
Pershaw.

Co. 7. Rep. 21.
Calvin's Case.

minion of the Kings of *England*, were natural born Subjects, and not Aliens.

Scotland is a Kingdom by Union, and therefore those that were born in *Scotland* under the Allegiance of the King, as of his Kingdom of *Scotland*, before the Crown came united, were Aliens born, and such a plea against such Persons was a good plea; but those that were born since the Crown of *England* descended to **King James**, are not Aliens, for they were born *sub fide & legiantia Domini Regis*; so those that are born at this day in *Virginia*, *New England*, *Barbadoes*, *Jamaica*, or any other of his Majesty's Plantations and Dominions, are natural born Subjects and not Aliens; so likewise those that are born upon the King of *England's* Seas are not Aliens.

Lord Vaughan,
fol. 268. *Craw.*
versus Ramsey.

Sir John Bur-
rough's Sove-
reignty of the
Seas, fol. 402.

X. But if an Alien be made an Abbot, Prior, Bishop or Dean, by the plea of an Alien, we shall not disable him to bring any real or mixt action concerning the possessions that he holds in his politick capacity, *because the same is brought in auter droit*

Pa'ch. 31 *Eliz.*

C. B.

Dy. 2. pl. 8.

Lutw. 25.

Salk. 46.

Mich. 6. Jac. in

C. B. Brownlow.

1. part, fol. 42.

The like Law is for an Executor or Administrator because the recovery is to another's use, 3 *Cro.* 68. *Brooks* against *Philips*; yet see the same Book, 14. pl. 7.

If an Action is brought against an Alien, and there is a Verdict and Judgment against him, yet he may bring a Writ of Error and be Plaintiff there, and that such plea is not good in that case.

Mich. 29 *Eliz.*

in C. B. Golds-

borough, Fo. 29.

Mich. 30 *Eliz.*

Coke 5. part,

Pages Case, fol.

52. Moore 4

Walton ver.

Mashum.

Dyer 282. A

lien Stamfords

Prerogative

Regis, art. 18.

fol. 53. tit.

King Scisin,

C. B.

Though an Alien may purchase and take the which he cannot keep or retain, yet the Law has provided a mean of inquiry before he can be divested of the same, for until some Office be found, the Freehold is in him.

And this Office, which is to gain to the King Fee or Freehold, must be under the Great-Seal of *England*, for a Commission under the Exchequer-Seal is not sufficient to entitle the King, to the Land of an Alien born, for the Commission is that which gives a title to the King, for before that the King hath no title; but in cases of *Treason*, there upon Attainder the Lands are in the King without Office and in that case, to inform the Court a Commis-

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may go out under the Exchequer-Seal.

Cross vers.

XI. If an Alien and a Subject born purchase Lands to them and to their Heirs, they are joint Tenants, and shall joyn in Affize, and the Survivor shall hold place till Office found.

Gayer, Cro. 3. part. fol. 123. Plowd. Com. 477.

By the finding of this Office the Party is out of possession, if the same be of Houses or Lands, or such things as do lye in livery; but of Rents, Com-mun, Advowsons, and other Inheritances incorpo-rated which lye in Grant, the Alien is not out of pos-session (be they appendant or in gross) therefore if an Information or an Action be brought for the same, the Party may traverse the Office in that Court, where the Action or Information is brought for the King.

17 E. 3. fol. 10 Hen. Hill. Case.

And if the King obtains not the possession within the year after the Office found, he cannot seize without a *Scire facias*.

* 29 Affize 30, 31, 32. Affize Travers 32.

It is not for the Honour of the King (an Alien pur-chasing of a Copy-hold) to seize the same, for that the same is a base Tenure; and so it was adjudged

vouched in Stamford pl. fol. 54. cap. 18.

where a Copy-hold was surrendered to J. S. in trust, that one Holland an Alien, should take the profits thereof to his own use and benefit; upon an inquisition taken, it was adjudged the same was void and should be quashed, because the King cannot be entituled to the Copy-hold Lands of an Alien, nor to the use of Copy-hold Lands as the principal Case was.

† 23 Car. in B. R. Styles 20. King vers. Hol- Land.

An Alien Infant under the Age of 21 Years, cannot be a Merchant Trader within this Realm, nor can he enter any Goods in his own name at the Custom-house.

13 & 14 Car. 2. cap. 11. §. 10

If an *English* Man shall go beyond the Seas, and shall there become a sworn Subject to any Foreign Prince or State, he shall be looked upon in the nature of an Alien, and shall pay such Imposition, as Aliens, if he comes and lives in *England* again, he shall be restored to his Liberties.

14, 15 H. 8. cap. 4.

An Alien is robbed, and then he makes his Executor, and dyes, and afterward the Goods are wafted

1 Ro. 1. 141. 3 Bulstr. 19.

the

the Lord of the Franchise shall not have them, but the Executors. *Vide* 13 E. 4. fol.

All Personal Actions he may sue as on a Bond, *1 Bulst.* 134. likewise for words; for the *Common Law* according to the Laws of Nations protects Trade and Traffick and not to have the benefit of the Law in such case *Turloote versus Monson* 8 Jac. B. R. is to deny Trade.

Moore, fol. 431.

But yet Aliens and Denizens are restrained by the Statute of 5 Eliz. Ca. to any Trade, not having served seven years as Apprentices within the Realm, *vide* the Statute what Trades, *Trin.* 12 Car. 1. at Sergeants-Inn in Fleet-street by all the Judges. *Hutton's Reports, fol. 132.* but *quare* that Resolution.

CHA

C H A P. III.

Of Naturalization and Denization.

Whether the Kings of England can naturalize without Act of Parliament.

II. What operation Naturalization hath in reference to remove the disability arising from themselves.

III. What operation Naturalization hath in reference to remove defects arising from a lineal or collateral Ancestor.

IV. Where Persons born out of the Realm may inherit by the Laws of England.

V. A Kingdom conquered, and united to the Crown of England, whether by granting them a Power to make Laws can impliciteley create in them such a Sovereignty, as to impose on the Realm of England.

VI. Of Persons naturalized by a Kingdom dependent, whether capable of imposing on one that is absolute.

VII. Of Kingdoms obtained by conquest, how the Empire of the same is acquired, and how the Conqueror succeeds.

VIII. Ireland what condition it was accounted before the Con-

quest in reference to the Natives of the same, and whether by making it a Kingdom, they can create a Foreigner as a natural born Subject of England.

IX. Of Aliens in reference to the transmission of their Goods and Chattels by the Laws of France.

X. Of the Privileges the Kings of England, of old, claimed in the Estates of Jews dying commorant here, and how the same at this day stands.

XI. Of Persons born in places annexed or claimed by the Crown of England, how esteemed by the Laws of the same.

XII. Of Denization, and what operation it hath according to the Laws of England.

XIII. Where an Alien is capable of Dower by the Laws of England, and where not, and of the total incapacity of a Jew.

XIV. Whether a Denizen is capable of the creation and retention of Honour, by the Laws of England.

THE Father and Mother are the fountain of the blood natural, and as it is that that makes their Issue, Sons or Daughters, so it is that that makes them Brothers and Sisters; but it is the civil qualifications of the blood that makes them inheritable one to the other, and capable of enjoying the communities and Privileges of the Kingdom; but that

that is from another fountain, viz. the Law of the Land, which finding them legitimate, doth transplant them into the Civil Rights of the Land, by an Act called Naturalization; which does superinduce and cloath that natural Consanguinity with Civil hereditary quality, whereby they are enabled not only to inherit each other, but also to enjoy all the Immunities and Privileges that meer natural born Subjects may or can challenge.

Serv. lib. 2.
cap. 12.

II. According to the Laws of *Normandy* the Prince might *naturalize*; but such *Naturalization* could not divest the descent already vested.

1 Inst. 129. a. But according to our Law by no way but by Act of Parliament, and that cures the defect as if they had been born in *England*, and no Man shall be received against an Act of Parliament to say the contrary.

Therefore if the Father an *Alien* has issue a Son born here, and then the Son is naturalized, the Son shall inherit.

Com. Litt. 129. If the Father, a natural born Subject, has issue an *Alien* who is naturalized, the Father dyes, the Son shall inherit.

III. *Naturalization* does remove all that disability and incapacity, which is in Aliens in respect of themselves, and so puts them entirely in the condition as if they had been born in *England*.

The *Relative* terms, as if born in *England*, is generally used to supply the personal defect of the party naturalized, arising from their birth out of *England* and therefore shall never be carried to a collateral purpose, nor cures a disease of another nature, as *blood*, *illegitimation*, and the like; but all diseases whether in the parties themselves, or resulting from the Ancestor, it cures.

Acts of Parliament of this nature may be so penally as to cure defects in the Father or Ancestor, or in the parties themselves.

Coke 3. Inst.
fol. 241.

If *Restitution* in blood be granted to the Son by Act of Parliament, this cures that disability that results from the Fathers Attainder, and that not only to the Son, but also to the collateral Heirs of the Father; the true reason of this is, because the corruption of the blood

by the Attainder is only blood of the Father, for the Sons blood or collateral Heir was not at all corrupted; for the scope of the Act taking notice of the Father's Attainder, does intentionally provide against, and remove it, for otherwise the same had been useless.

But in *Naturalization* without express words, it takes no notice of the defects in the Father or other Ancestor, nor removes them.

And therefore such Acts of Parliament as take no other notice but of the Persons Naturaliz'd Foreign birth, the same cures not any disability of transmission hereditary between the Father, Brother, or any other Ancestor, resulting from the disability of them without actually naming of them: As for instance, the Father an Alien, the Son naturalized by Act of Parliament, the Father or any other Ancestor an Alien purchases Lands and dyes, the Son shall not take by reason of the disability in the Father, but there may be words inserted in the Act that may take away the impediment.

IV. There are four ways by which Men born out of England, may inherit in England, besides by the Statute of Edward the Third, *De Natis ultra mare*.

1. If they be born in any Dominion of the King's, when he is actually King of England.

2. If they be made inheritable by Act of Parliament in England.

3. If they be born Subjects to a Prince holding his Kingdom or Territories as Homager and Leigeman to the King of England during the time of his being Homager: So the Welch were inheritable in England before 12 Ed. 1. though Subjects to the Princes of Wales, who were Homagers to the King of England. So were the Scotch in Edward the First's time; but when once the Homage determines, then they become Aliens, otherwise Subjects, and upon that reason *Magdolph* a Scot appealed * from the Judgment of his Prince to Edward the First *ut Superiori Domino Scotia*; but then it must be understood where such Prince is Homager *subjectionis*, and not only *infeodationis*, for another King may hold of the King of England an Island

Calvin's Case,
fol. 21. b.

* *Placit. Parl.*
21. Ed. 1. fol.
152, 157.

Island or other Territory by tenure, and not be h Subject.

4. If the King of *England* enters in a hostile manner the Territories of another Prince or State, and any b born within any of the Places or Guards possessed b the King's Army, they are looked upon in Law to b within his protection, and such Person born is a n tural born Subject of *England*, but then he must be c Parents Subjects †, not hostile; and therefore a B stard born in *Tangier* is capable of purchasing Lan in *England*, if his Parents were Subjects.

† Eliz. Dyer.
fol. 224.
placit. 29.
Craw vers.
Ramsey, Lord
Vaughan, fol.
280.

V. Those that are born in *Ireland*, and those th are born in *Scotland* are all alike, for their Births a within the Kings Dominions, and they are born u der the like subjection and obedience to the King, an have the like band of allegiance *ad fidem Regis*, y if a *Spaniard* comes into *Ireland*, and by the Parli ment is there naturalized, though perhaps this ma qualifie and cloath him with the title of a natu born Subject of *Ireland*, yet it has been conceived that it will not make him a natural born Subject o *England*.

My Lord Coke
so conceives,
but Mr. Selden
denies thace-
ver there was
any such mo-
dus tenendi,
but the same
is an impo-
ssure. Vide his
Tit. of Ho-
nour, fol. 708,
710, 718, to
721.

For the Union of *Ireland* to that of *England*, is di ferent from that of *Scotland*, for the first is depende as a Kingdom conquered, the latter independent. Though *Henry* the Second after his Conquest of the Nation, did remit over from *England* the ancient mo- *tenendi Parliamentum*, enabling them to hold Parli- ments, which after was confirmed by King *John*; y that was by no other force than bare Letters Patent. Now when a Nation is once conquered, there remain no Law, but that of the Conqueror; and though h may incorporate such conquered Nations with h own, and grant unto them their ancient Parliamen- tary ways of making of Laws; yet the Conqueror can no ways grant unto them a Power, by virtue of such Grant or Confirmation, as to impose upon h own Country, for he himself before such Conquest could not make a natural born Subject without Act of Parliament, and most certainly his Conquest add nothing to his Power, though it does increase h Dominion.

VI. Again

VI. Again, Kingdoms that are absolute under one Prince, *ad fidem Regis*, there the Acts of each other are reciprocate, and one naturalized by the Parliament of *Scotland*, is as naturalized in *England*, because *Scotland* is a Kingdom absolute, and yet in the Case of *Craw* and *Ramsay* it is there held, That an Alien naturalized in *Scotland* remains an Alien notwithstanding; but *Ireland* is a Kingdom dependent and subordinate to the Parliament of *England*, for the Parliament in *England*, can make an Act to bind *Ireland*, but not *in converso*. Now to be a Native of *Ireland*, is the same as to be born in *Ireland*, but that is by the Laws of *Ireland*; but to be born in *Ireland*, and to be the same as to be born in *England*, must be by the Laws of *England*: But there is no Law that hath enabled them with such a power, as to naturalize further than their own Laws extend; but the Law of *Ireland* does not extend into *England*, therefore Naturalization in *Ireland* operates only in *Ireland*, because of the failure of power.

VII. Again, Kingdoms that are conquered, the Empire of the same may be acquired by the Conqueror, only as it is in a King, or other Governour, and then the Conqueror, only succeeds in his right, and no further*, or also as 'tis in the People, in which case the Conqueror hath Empire, so as that he may dispose of it, or alienate it as the People themselves might; for 'tis one thing to inquire of the thing, another, of the manner of the holding of it, the which are applicable not only to corporal things, but incorporal also: For as a Field is a thing possessed, so is a Passage, an Act, a Way; but these things some hold by a full right of property, others by a right of usufructuary, others by a temporary right. Again, by the Will of the Conqueror, the Kingdom or Republick that is so conquered, may cease to be a Kingdom or Commonwealth, either so that it may be an accession of another Kingdom or Commonwealth, as the *Roman Provinces*, or that it may in no ways add hereto any Kingdom or Commonwealth, as if a King waging War at his own charge, so conquer and subject a People to himself, that he will

Selden's Titles of Honour fol. 213. in *Scotland*, the title is *Carolus Scotia, Anglia, Francia, & Hibernia Rex*; but in *Ireland*, *Anglia, Scotia* Note *Scotland* is not a Dominion belonging to the Crown of *England*, but to the King of *England*.

From hence it is that the King at this day cannot alien or sell *Ireland* without an Act of Parliament, for they whose right he succeeds, could not do it, Co. 4. Instit. fol. 357. nor can he grant, *Portus Maris obedienciis ad vocationibus patronationibus Ecclesiarum Metropoliticarum & Cathedr.*

dualium Cancellar. Justiciar. nor mero & mixto Imperio, and many more, all which are inseparably annexed to a Kingdom.

† Imperium aliud est obutilitatem ejus qui regitur, hoc inter liberos locum habet, illud inter dominos & servos. Arist. lib. 7. de Republica.

* Case of the Earl of Shrewsbury on the Stat. of 28 H. 8. of Absentees, 4 prescribes, fol. 354.

by such Laws as the Conqueror should transmit them †, all which are the tokens of a Nation by Conquest made subordinate to the Conqueror, and part Herile, and part Civil; and though they remain a Kingdom, and absolute within themselves as to the making of Laws, to obliging each other yet they can no ways impose on their Conqueror for though that be true which in *Quintilian* is alleged on the behalf of the *Thebans*, That that only the Conqueror's which he holds himself; but an corporeal right cannot be holden, and the condition of an Heir and of a Conqueror is different, cause the *Right* passeth to the former by the descent but only the *thing* to the last by virtue of the Conquest. But certainly that is no objection, for he that is Master of the Persons, is also Master of the Things and of all right which does belong to the Person for he that is possessed †, doth not possess for himself, nor hath he any thing in his power who is not himself; and so it is if he leaves the right of a Kingdom to a conquered People, he may take himself some things which were the Kingdom

† Leg. qui in servitute est, reg. Juris Leg. si venerit D. ed Leg. Jud. de Adult.

For it is at his pleasure to appoint what measure he will to his own Favour: From hence it is we may observe what sort of Empire that Kingdom is at this day.

VII. Now *Ireland* before the same became united to the Crown by the Conquest of *Henry the Second*, the Natives were meer Aliens. and out of the protection of the Laws of this Realm; yet when once they became a conquered People, and subject to the Crown of *England*, and united *ad fidem Regis*, then did arise their Allegiance; but that Union neither made them capable of the Laws of *England*, nor of their own, till such time as the Conqueror had so declared them: Now what do they desire in order to revive their Government? First, they humbly beg of King *Henry the Second*, that since he was pleased that they should remain as a distinct Dominion, that their ancient Customs or Usages should not continue; that he would be pleased or ordain, that such Laws as he had in *England* * should be of Force, and observed in *Ireland*; pursuant to which he grants them power to hold Assemblies by the three Estates of the Realm, and that they should be regulated according to the Institution and manner of the Parliaments in *England*, should have the same established, and made of force in *Ireland*, *Geraldus Cambrensis Topographia Hibernia*, lib. 3. cap. 18. * *Pat. 8 E. 1. m. 13. Hibern.*

Calvin's Case.
Lib. 7. fol. 23.

For at a general Council at *Cassels* of all the Clergy there, Anno 1170. Ecclesiastical Laws of *England*

* *Matthew Paris Hist. Angl. pag. 121. Leges Angliae ab omnibus sunt grate acceptae.*
† *Oruck's Case, 33 Eliz. Col. 7. part. fol. 23.*

Calvin's Case. * *Ryly's Placita Parliam. pag. 198 to 208.*

Now here is no continuing or reviving their ancient Government, but the introducing a new one, part Civil, and part Herile; nor indeed had they more any such thing as a Parliament there, or general

Sir John Davies on the Conquest of Ireland, 103, 104, 105.

Lord Vaughan, fol. 301. *Craw versus Ramsey.*

neral Assembly of the three Estates; for when Henry, the Second went over, there were several Kings or Sceptes, who had their severall and distinct Assemblies; but when they submitted, this great Assembly of Estates which he constituted, was a collection out of all of them, for their future well Government; so that whatsoever *modus* of Regimen the Conqueror declared, it was no more than for the well governing of the place, and making such Laws as were necessary, and proper amongst themselves. But for them to impose, by virtue of an Act of Naturalization, upon an absolute Kingdom as England, without the consent of the three Estates of the Realm, surely was never intended, much less effected: The case is both great, dubious, and curious, therefore *quære*.

IX. By the Laws of France all Persons not born under the legiance of that King, are accounted aliens, and if they die, the King is entitled to the Estates; for all shall be seized into his *Exchequer*, or *chambres*; but if they make a Will, the Prerogative is disappointed: Yet that extends only to Chattels personal, in which Strangers passing through the same, have greater Immunities than Aliens there resident; for Travellers dying without Will, the Heir or Executors shall have benefit and possession of the Estates.

X. The like Priviledge the Kings of England formerly claimed in the Goods and Estates of the dead after their death, if the Heir sued not, and paid Fine to the King to enjoy them, as by this Record appears.

Furatores super sacrum suum dicunt quod prædictum Missuagium fuit quondam Eliæ le Bland, qui, &c. diem clausit extremum, et quia mos est Judæismi quod Dominus non habet omnia, &c. Cattalla Judei mortui de jure dare poterit cui voluerit, nisi propinquior hæres ejusdem Judæi finem fecerit. Eisdem, dicunt quod Dominus Rex dictum Missuagium dare poterit cui voluerit sine injuria alicui facienda, si ita sit hæres dicti Elæi, finem non secreit pro Catallis ejusdem Eliæ habendis, &c.

Escheat An. 52. H. 3 num. 31.

Caroon's Case.

But whether the same is now used, may be doubted.

doubtful; for the Goods of Aliens escheat not at this *Hoby's Case*.
 day to the Crown, but Administration shall be com- *Stephen's Case*
 mitted to the next of kin.

XI. By the Laws of *France, Flanders, Milan, Savoy,*
 and the *French Comptee*, though possessed by several
 other Princes, yet the Natives of the same partake in
 the Immunities with the natural born Subjects of *France*,
 and if they die without Will, their Heirs claim their
 Estates; the Reason given, because, say they, those
 countries were never alienated from them, but were al-
 ways annexed to the Crown of *France*, who acknowledg-
 ed them to be his Subjects to this day.
 But in *England* it is otherwise, for those that are
 born in *Gascon, Normandy, Aquitain*, and those other
 territories which were formerly the possessions of
 the Crown of *England*, in which if any had been
 when subject to the same, they would have
 been natural born Subjects, yet now are esteemed
 Aliens; and so was the case vouched by *Shard*, of a
Norman, who had robbed together with other *English*
 robbers of his Majesties Subjects in the narrow Seas, be-
 taken and arraigned, the *Norman* was found guilty
 of Felony, and the rest of Treason; for that
Normandy being lost by King *John*, was out of the Al-
 liance of *Ed. 3.* and the *Norman* was accounted as an
 Alien.

Note, This was before the Statute of 25 E. 3. it's vouched by a Shard in 40. Affize pl. 241. See Calvin's Case 7. Report.

XII. In *France* the Kings may there Denize, so like-
 here in *England*, but with this difference, the Let-
 ters of Denization by those of *France* remove the total
 disability and incapacity of the Alien.

But in *England* the Charter of Donation or Deni-
 zation is but a temporary, partial, and imperfect
 removal of the disability of an Alien; for though it
 changes the Person indenized, as to some purposes, in
 condition of a Subject, and enables a transmission
 hereditary to his Children, born after the Deniza-
 tion, yet it does not wholly remove the disease or non-
 removal, as to the points of descent or hereditary trans-
 mission, and resembles a Person in case of an Attain-
 der, and therefore if he purchases Lands and dies
 without issue, the Lord by Escheat shall have the
 Lands.

Vide 1 Inst. c. 29. 2. The Difference between Naturalization and Denization.

Co. 1 Inst. fol. 2.

*Godfry and
Dixon's Case.*

Hill. 16 Jac. 8.

B. R. Godbolt.

175.

30 H. 8. Dyer

44.

1 Inst. 31. b.

And therefore in lineal Descents, if there Grandfather natural born Subject, Father an Alien natural born Subject, the Father is made Denizen shall not inherit the Grandfather; and if the Father dies in the life of the Grandfather, the Grandfather (though born after the Denization) shall not inherit the Grandfather, for the Denization does not remove neither the personal nor the consequential impediment, or incapacity of the Father.

So likewise in collateral Descents; as for instance the Father a natural born Subject, had issue two Aliens, who are both made Denizens, and one the other shall not inherit him.

26 Ed. 1. Rot.
part 1.

XIII. The like Law in Dower, a Man seizes Lands in Fee, and takes an Alien to Wife, and dies, the Wife shall not be endowed: But if the Man takes an Alien to Wife, and dies, his Widow shall be endowed by the Law of the Crown. *Mund*, Brother of King *Edward* the First, married the Queen of *Navar*, and died, and it was resolved by all the Judges, That she should be endowed of the third part of all the Lands whereof her Husband seized in Fee.

1 Inst. 31. b.
32. a.

A *Jew* born in *England*, takes to Wife a *Jew* also in *England*, the Husband is converted to Christian Faith, purchases Lands, and enfeoffed another, and dieth; the Wife brought a Writ of *Recovery*, and was barred of her Dower, *Quia vero contra justitiam est quod ipsa dotem petat, vel habeat de feodo mento quod fuit viri sui ex quo in conversione sua non adherere, & cum eo convertere.*

Clauſ. H. 3
Mem. 17. Dorſ.

C. 1 Inst. fel.
278. B.

XIV. If an Alien be a Disseisor, and obtains Letters of Denization, and then the Disseisor releases unto him, the King shall not have the Land; for Release hath altered the Estate, and it is as if it were a new purchase, otherwise it is, if the Alien had been Feoffee of the Disseisee.

And though Aliens are enabled by Charter of Denization to a transmissiō hereditary to their heirs of Lands, yet a Denizen is not capable of a transmissiō, nor a transmissiō of the same, without a Naturalization by Parliament; for by the Charter of

ation he is made, *quasi, seu tanquam ligeus*, but to be *Co. 4. Instit.*
 Member of Parliament, he must be *ligeus revera*, & *fol. 4.*
quasi, for by his becoming a Nobleman, he claims
 the place of Judicature in Parliament, the which he
 cannot till naturalized by Act of Parliament, and
 when he may claim as eligible to the same, or any *Decreed in*
 other: And the same Law is at this day in *France*, the *grand E-*
 where no Foreigner can hold any Honour or Dig- *state of Paris,*
 nity in the State or any part of the Government. *1607.*
 istrue, Cardinal *Mazarine*, who was an *Italian*, held
 great share in the same, but it was *vi, & manu for-V. de Monmouth*
 and was the occasion of introducing a Civil War *Hist. of France,*
 that Kingdom; and yet the late Duke of *Rich- f. 15.*
 and claimed the Honour or Dignity of a Peer of
 France, as Lord of *Aubon*, but that was a Title ra-
 ther annexed to the Tenure of that Seigniori than
 otherwise.

And though his Majesty has been pleased to con-
 fer the Dignity of Dutcheſs of *Portsmouth* on the Lady
Arwel, yet the same is rather Honorary than a Title
 consistent with the Laws of *England*: For though his
 Majesty is the Fountain of Honour, and may call
 the meanest of his Subjects to the highest of Digni-
 ties, yet it is their Civil qualifications which make
 them capable of injoying the Immunities and Privi-
 leges of Peers; but that flows from another Foun-
 tain, even the Law of the Realm, which as to Deni-
 gation disable them to take so signal a mark of Sovere-
 ignty without Act of Parliament.

C H A P. IV.

Of Aliens and Tryals per medietatem, where allowed, and where not,

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| <p>I. Of the manner of Aliens obtaining Tryals per medietatem at the Common Law, and of the Antiquity of the same.</p> <p>II. Of the making the same a Law universal within this Realm, as to some Persons, afterwards general, as to all.</p> <p>III. Of the VVrit and some Observations on the Summons of such an Inquest.</p> <p>IV. Of the opportunity lost or gained by praying this Immunity.</p> | <p>V. Of the awarding of Tales on request on such Enquiries.</p> <p>VI. VVhere this Immunity does not extend to Aliens, and where it does in matters Civil and Criminal.</p> <p>VII. Of the validity of a VVness Alien, and of an Infidel.</p> <p>VIII. The Title of a Renegado.</p> <p>IX. Of the benefit of the King's Pardon, whether it extends to an Alien, whose abode is here but happens to be absent at the time of the promulgation.</p> |
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I. **T** *Ratio bilinguis* or *per medietatem linguae*, by the Common Law was wont to be obtained by Grant of the King, made to any Company of Strangers, as the Society of Lombards or *Almaignes*, or to any other Corporation or Company; when any of them were impleaded, the Moiety of the Enquest should be of the own Tongue; this Tryal *per medietatem* in England of great Antiquity, for in some cases Tryals *per medietatem* was before the Conquest, *Viri duodecim Jure Civili, sex Wallia, totidem Anglia, & Wallia jus dicant* Co. 1. Inst. 155. and as the Commentator observes, it was called *duodecim virile Judicium*.

II. This Immunity afterwards being found commodious to us Islanders, became universal; for by the Statute of 27 E. 3. cap. 8. it was enacted, that in Pleas before the Major of the Staple, if both Parties were Strangers, the Tryal should be by Strangers; but if one Party was a Stranger, and the other a Denizen, then the Tryal should be *per medietatem Linguae*: But this Statute extended but to a narrow compass, viz. 28 E. 3. c. 13. only where both Parties were Merchants or Minis-

of the Staple, and the Pleas before the Major of the Staple: But afterwards in the twenty eighth year of the same King's Reign it was enacted, That all manner of Inquests, which was to be taken or made amongst Aliens & Denizens, whether Merchants, or others, as well before the Major of the Staple, as before any other Justice or Ministers: Although the King be Party, the one half of the Enquest or Proof shall be Denizens, the other half Aliens, if so many Aliens and Foreigners be in the Town or Place where such Enquest or Proof is to be taken that be not Parties, nor with the Parties in Contract, in Plea, or other quarrel, whereof such Inquest or Proof ought to be taken; and if there be not so many Aliens, then shall there be put in such Enquests or Proofs as many Aliens as shall be found in the same Town or places, which be not there Parties, as aforesaid; and the remnant of Denizens, which be good Men, and not suspicious to the one Party or other.

By which Statute the same Custom or Immunity was made a Law universal, although it be in the Case of the King, for the Alien shall have his Tryal *per medietatem*. But if it be for Treason, &c. *contra. Vide postea num. 5.*

It matters not whether the moiety of Aliens be of the same Country, as the Alien party to the Action; for he may be a Dutch Man, and they Spaniards, French, Walloons, &c. because the Statute speaks generally of Aliens.

III. The Form of the *Venire facias* in this case is, *De vicineto, &c. quorum una medietas sit de Indigenes, & alia medietas sit de alienigenis natis. &c.* And the Sheriff ought to return twelve Aliens and twelve Denizens, one by the other, with addition which of them are Aliens, and so they are to be sworn; but if this Order be not observed, it is holden as a misreturn. *Cro. 3. part 818. 811. Bro. tit. Tryal.*

It has been conceived of some, that it is not proper to call it a Tryal *per medietatem Linguae*, because any Alien of any Tongue may serve; but that is only is no Objection, for People are distinguished by their Language, and *medietas Linguae* is as much as to say, half English, and half of any other Tongue or Nation whatsoever; nor matters it of what

Cro. El. 841. Jurors are, for the form of the *Venire facias* shall not be altered, but the clause of *quorum quilibet habeat* at 4, &c. shall be in.

21 *H. 6.* 4. If both Parties are *Aliens*, then the Enquest shall be all *English*; for though the *English* may be supposed to favour themselves more than *Strangers*, yet when both Parties are *Aliens*, it will be presumed they will favour both alike, without any difference.

2 *Ro. Abr.* 643. Where an Issue is joyned between a Denizen and an Alien, and a *Veniri facias* awarded *per medietate Lingua*; and the Sheriff returns 12 Denizens and 12 others for Aliens, whereas in Truth there are not 12 Aliens nor 6 Aliens returned: In this Case it seems that the Alien may challenge the Array, for otherwise he hath no Remedy, if he shall be concluded by the Sheriff's Return.

Dy. 28. a. in Margine But if he doth not challenge, and so they are impanelled, &c. it is sufficient; yet if eight Denizens and four Aliens are impanelled it is ill, because it appears in this Case that the Tryal is not *per medietate*.

Cro. El. 277. If a Writ of Inquiry of Damages be awarded in an Action between a Denizen and an Alien, the Enquest shall be all of *English*, and not part of *Aliens* for it is out of the Statute.

Dyer 28. a. IV. If an *Alien* is party, who slips his opportunity and suffers a Tryal by all *English*, the Judgment is not *Erroneous*; for if he will be so negligent as to lose that advantage which the Law gives him, it is his fault; (a) for the Alien, if he will have the benefit of that Law, must pray a *Venire facias per medietate Lingua*, at the time of the awarding the *Venire facias*. But if a neglect of that opportunity happens, yet if he prays it after the awarding a general *Venire facias*, the same may be retrieved, so as it be before the *Venire facias* be returned and filed, for then he may have *Venire facias de novo*, or otherwise he cannot, (b) nor can he afterwards challenge the Array for this cause, if it falls out the Juries are all *Denizens*; though *Sandford* seems to be of a contrary Opinion, for the Alien must pray it at his peril, *Heyward* against *Lipson*.

(b) *Pl. Coron.* 150. *Dyer* 357. he afterwards challenge the Array for this cause, if it falls out the Juries are all *Denizens*; though *Sandford* seems to be of a contrary Opinion, for the Alien must pray it at his peril, *Heyward* against *Lipson*.
V. If there be a general *Venire facias*, the Defendant cannot pray a *decem Tales*, &c. *per medietate*

Lingua upon this, because the *Tales* ought to pursue ^{10 Co. 104. a.} the *Venire facias* : But if the *Venire facias* be *per medietatem Lingua*, the *Tales* ought to be *per medietatem Lingua*, as if five Aliens and five Denizens appear on the principal Jury, the Plaintiff may have a *Tales per medietatem* ; but if the *Tales* be general *de circumstantibus* ^{Cro. El. 818, 841.}, it hath been held good enough, for there being no exception taken by the Defendant upon the awarding thereof, it shall be intended well awarded.

If an *Alien* that lives here under the protection of the King of England, and Amity being between both ^{21 H. 4. Stamford. 154. Hill. 36. Eliz. Dr. Lopez Case by all the Judges.} King's commits *Treason*, he shall by force of the Act of 2. Philip and Mary, be tryed according to the course of the *Common Law*, and shall not in that case be tryed *per medietatem Lingua*.

But in the case of *Petit Treason*, *Murder*, *Felony*, &c. if he prays his Tryal *per medietatem Lingua*, the Court ought to grant it. ^{Vide Lord Dyer fol. 144. the Case of Sherly}

where the point is fully handled. *Co. Instit.* 3. part. f. 27.

Yet if an *Information* be exhibited against an *Alien*, ^{Moores Rep. 157. Barr's Case.} and an *Englishman*, the Tryal is not *per medietatem*, but according to the *Common Law*.

If an *Alien in League* bring an Action (if there be ^{Colvire Coke's Entries tit. Alien 1.} cause) the Defendant may plead in abatement ; but if it be an *Alien Enemy* he may conclude in the action.

In an Action for words the Defendant pleaded Not guilty, and said he was an Alien born, and prayed Tryal *per medietatem Lingua*, which was granted, and ^{Stam. 160. B. 27 Ed. 3. cap. 8. 28 Ed. 3. 13. 2 H. 5. 3. Dy. 28. a. in Margine} at the *nisi prius* in London, but six *English Men* and five Aliens appeared, and the Plaintiff prayed a *Tales de Circumstantibus per medietatem Lingua*, and it was granted, so there wanted one Alien, and the Record was :

Id eo alius Alienigenia de Circumstantibus per Vic. Lon- ^{10 Co. 104. a.} *don, ad requisitionem infra nominati Julii Caesaris, per mandatum Justiciariorum de novo appositus cujus nomen annello predict. affilatur, ecundum formam Statui in hujusmodi casu nuper editi & provisi quiquidem Furator de novo appositus, viz. Christianus Dethick Alieni- gena exactus venit ac in Furatam illam simul cum aliis Furatoribus*

Mich. 35. 36.
Eliz. in B. R.
Sir Julius Ca-
sar versus Phi-
lip Corfins.

Juratoribus prædict. prius impanellatis, & Juratis Juratus fuit, &c. It was found for the Plaintiff, and afterwards moved in Arrest of Judgment, That the *Tales* was to be granted *de Circumstantibus*, where the Tryal is *per medietatem Lingua*, by the Justices *Nisi prius*, by the Act of 35 H. 3. because in the Act it is spoken of Free-hold of Jurors, and an Alien not properly said of any Country, or to have any Free-hold; but it was adjudged because the Statute was made for speedy Execution, that it should be expounded favourably, according to the intent and meaning of the Makers of the Act; and though in this case the *Tales* was prayed by the Plaintiff, where it ought to have been *ad requisitionem Defendentis*, yet that should be taken to be but a misprision, and would be amended.

Dy. 28.
a Margine
Cro. El. 275.

VI. If the Plaintiff or Defendant be *Executor* or *Administrator*, though he be an *Alien*, yet the Tryal shall be by *English*, because he sueth in *Auter Droit*; but if it be averred that the *Testator* or intestate was an *Alien*, then it shall be *per medietatem Lingua*.

7 Co. 6. b.

Shely a Frenchman who joyned with Stafford in the Rebellion, in taking of Scarborough Castle in the County of York, he being taken, was arraigned in the King's Bench upon an Indictment of *Treason*, and the Indictment was *contra legiantiam suam debitam*; and the Indictment was rul'd to be good, although he was no Subject, because it was in the time of Peace between the Queen and the French King. But if it had been in the time of War, then the Party should not have been indicted, but ransomed. It was likewise ruled there, that the Tryal was good, although the *Vere facias* awarded in York was general, and not *de medietate Lingua*; for such Tryal *per medietatem Lingua* does not extend to *Treasons*, and the Indictment ought to omit the words, *Naturalem Dominam suam*, and begin that he intended *Treason contra Dominam Reginam, &c.* Hill. 36 Eliz. in B. R. Stephano Ferrar de Game's Case in Dr. Lopez. *Treason.*

Dyer. 145.
Hob. 271.
Salk. 633.

7 Co. 6. b.

If an *Alien Enemy* come into this Realm, and be taken in War, he cannot be indicted of *Treason*, for

Sir John Davies Conquest of Ireland, fol. 103, 104, 105.

Book III.

The Indictment cannot conclude *contra legantiam suam* *habitam*, for he never was in the protection of the King; and therefore he shall suffer death by *Martial Law*, and so it was rul'd in 113 H. 7. in *Perkin Warbeck's Case*, who being an Alien born in *Flanders*, feigned himself to be one of the Sons of King *Edward the Fourth*, and invaded the Realm, with intent to take upon him the Dignity; who had his Judgment and Tryal by *Martial Law*, and not by the *Common Law of England*.

VII. The Kingdom of *Ireland* was a Dominion separated and divided from *England* at the first, and came to the Crown of *England* by *Conquest*, in the time of *Henry the Second*; and the meer *Irish* were as *Aliens*, *Enemies* to the Crown of *England*, and were disabled to bring any action, and were out of the protection of the *Laws* of this Realm; and five *Scepts* of the *Irish* Nation were only enabled to the *Laws* of *England*, viz. *Oneil de Ultonia*, *O Mollogblin de Media*, *O Connogbor de Connacia*, *O Brian de Tholmoio*, and *Mac Morough de Lagenia*, as appears by the Records of the Dominion of *Ireland*, and several Grants have been made to the *Irish*, which proves them to be meer *Aliens*. But afterwards, though the same was a separate and divided Kingdom, yet whilst they were under the subjection and obedience of the Kings of *England*, if *High Treason* had been committed by an *Irish-man*, he might be arraigned, indicted, and tryed for the same within *England*, and by the *Laws* of *England*; and so it was resolved by all the Judges of *England* in *Oruck's Case*, 33 *Eliz.* and also in *Sir John Perrot's Case*, That *Ireland* was out of *England*, and yet that all *Treasons* committed there, were to be tryed in *England*, and that by virtue of the Statute of 38 H. 8. cap. 23. *Arthur Crobagen*, an *Irish* Man, was arraigned, for that he being the King's Subject, at *Lisbon* in *Spain* used these words, *I will kill the King* (*inuendo Dominum Carolum Regem Anglie*) *if I may come unto him, because he is a Heretick*; that afterwards he came into *England*, and was taken, and tryed by a Jury of *Middlesex*, and was found guilty;

Co. 7. fol. 23. Calvin's Case.

Cro. Car. 333.

guilty; and it was held High Treason by the court of the *Common Law*, for his Traiterous intent, and imagination of his heart is declared by these words and within the Statute of 25 E. 3. he confesseth he was a *Dominican Fryar*, and Priest in *Spain*.

14 Eliz. in the Case of the Duke of Norfolk, Co. Instit. 4. pt. fol. 279. *Bracton* says, that an Alien born cannot be a Witness; but that is to be understood of an *Alien Infidel* for the Bishop of *Rosse*, being an Alien born (a Scot) was admitted to be a Witness, and sworn.

Yet an *Infidel* may bring an Action against another Merchant or any other however *, and that without controversy.

The testimony of a *Renegadoe* is not to be received at this day, by the Laws of any *Christian Kingdom or Republick*; he that hath once renounced his Faith can never be believed; therefore he cannot be a Witness and so it was rul'd where one *Domingo de la Cardre*, *Renegadoe*, who was sworn, and gave evidence; afterwards a new Tryal being granted, his Testimony was rejected, and he not suffered to be sworn, being at his Tryal proved, that he was a *Spaniard* and a *Christian* by Birth and Education, and after became a Jew.

Hill 17. 18. Car. 2. in B. R. Robles versus Langston.

Hobart, fol. 271. Counten's Case.

If an *Alien* be resident, and commits an offence, he shall have the benefit of the Kings general Pardon but if he is not in the Kingdom at the time of the Pardon promulgated, then he loses the benefit of the same; for he is no otherwise a Subject, but by his Residence here.

C H A P. V.

Of Planters.

I. Of Possession and its Original Right.

II. Of Vacancies natural, which give a right to Planters.

III. Of Civil Vacancies, how far the same might be possessed.

IV. Of Persons expelled, whether just to deny such to plant in places vacant.

V. Of Planters, whether they have a firm right, so as to dispose by Will, or only a Usufructuary possession.

VI. Of Planters, wanting things necessary for the support of humane life, generally considered according to the Laws of Nature.

VII. Wherefore one Man may naturally have more than an

other, and what conditions are annexed to such fortunes, for those that are in necessity.

VIII. VVhence it is that there was at the beginning, and is still a tacite condition of reassuming our Original rights, in case of extreme or natural necessity for natural Community.

IX. Of necessity considered in a Christian Community.

X. Of the Primitive Communion, considered in reference to its restrictions and limitations.

I. Of those things that are dedicated to God, and holy use, whether subject to the relief of our necessity.

I. **H**AVING in the first Chapter of this Book discoursed of the Original of Property deducing its inception, to that which we call possession or *meum*, and how the same may be altered by War, it may not seem unnecessary to discourse of the acquiring of Property in the new discoveries of those vast Immensities of *America*, which being prepossessed, seem to deny us legally that Title which we pretend to. Ascham fol. 15

Possession by Law, is esteemed the highest Title that Men can pretend to what they enjoy, which is nothing else but *positio pedis*; as if the Ancients had no other Scal to confirm their Tenures, but the prints of their Feet: And good reason, seeing the mind is not able to take up a place so well as the body; for many Mens Wills may concur in (wishing and liking) the same thing, but many bodies cannot concur

cür to the possessing it: Besides the mind cannot set an outward mark on what it likes, that thereby others might be warned to abstain from it, all which the body properly doth. *Abraham* and *Lot* going to plant, declared no more than this, *there was room or vacancy enough*; and therefore, without further examination or scruple, they knew they might turn to the right hand or to the left, to possess what they would to themselves.

II. This Vacancy, which gives us a right to plant, is to be considered in two respect, 1. Natural, 2. Civil: The first is in things which may be possessed, but actually are not, neither in property, nor use; such a Vacany which is *nullius in bonis*, might be occupied by *Switzers*, who, as *Cæsar* saith, would fain have changed their rough Hills for some nearer *Campania*; and Desarts or places uninhabited may be possessed and appropriated to the first Planter, and that without all controverfie, but especially by those who being expulsed from their own Seats or Estate, seek entertainment abroad: The *Ansebarians* in *Tacitus*, cry out, *As the Heaven to the Gods, so is the Earth granted to Mortals, and what is void is publick*: Looking up to the Sun and Stars, they did openly as it were inquire of them, *Whether they were pleased in beholding any ground empty, and without Inhabitants, they should rather cast forth the Sea, and overwhelm the Spoilers of the Earth.*

Tacitus Annal
13.

*Ubi nec possessio
est plene in bonis
mine, nec homo
plene in possessione.*

III. Civil Vacancy, is where it is not absolutely incorporated, as among the roving *Arabians* and *Moors* in *Barbary*, and other *Africans* and *Americans*, who possess one place to day, and another to morrow; these by their frequent returns, shew that they abandon not the places they remove from, as *derelictæ quæ quis in bonis amplius numerare non vult*; we cannot say, that their natural or voluptuary interest in them is no way improved; for *Grotius* seems to be of Opinion * That if there be some Desert or barren ground, the same ought to be granted to Strangers upon their request, and, says he, *It is also rightly seized on by them, giving this reason, For that Lands ought not to be esteemed occupied which are not cultivated;*

* *De Jure Bel.*
li ac Pacis lib.
2. cap. 2. §. 17.

but

not only as to the Empire, which remains entire to the first ^{† Dion. Prusse-} People, they do no offence who inhabit, and manure ^{enses, Orat. 5.} a part of the Land that lyes neglected [†].

But we must press this Argument of *Grotius* very tenderly, lest by the same reason others conclude, that those Estates which are not competently improved, are derelict and occupiable by others, which would introduce perpetual confusions, and easily persuade every Man that he could husband his Neighbours Lands better than himself: However this is a *Resse facta est* clear case for all Planters, that those Wastes, or *asperities* ^{concessio, quæst sine damno alterius.} *montes*, which the Natives make no use of, nor can receive any damage by their being possessed by others, may lawfully be impropriated by them.

IV. Again, if a Nation or People expelled their own Country, should desire to seek void places, or at least such as might not absolutely endamage a People into whose Territory they come, they may ^{Bald. 3. Conf. 293.} justly plant; the reason is, for that Dominion or Property might be introduced with a reception of such use which profits * such distressed People, and hurts * ^{Serv. ad 7. Æn.} not those; and therefore the Authors of Dominion are supposed willing rather to have it so; but to give away that which we have but a bare right to and no possession, can neither be just in the giver, nor law- ^{Littusq; rogatus innocuum, cuius vindicta, air, nulli possit nocere.} ful in the receiver. We have an eminent Example of this amongst the *Turks*; for the *Tartars* having overrun the North of *Asia*, and many Nations, fled from their own Countries for fear of them, amongst other the *Corasines* a warlike People, being thus unkennelled, they had their recourse to the *Sultan* of *Babylon*, and petitioned him to bestow some habitation upon them; their Suit, according to the Rules of Policy, he could neither safely grant nor deny; to admit them to be *coyntenants* in the same Country with the possessed *Turk* would turn to a present inconvenience and a future mischief, and to deny them, might perhaps edge their discontents into desperateness; therefore instead of giving them Gold, he sent them to the Mines, yet so as they took it as a very great courtesie; for he bestowed on them all the Lands which

Matthew Paris, fol. 851.

Matthew Paris
fol. 834^v 835.

which the Christians held in *Palestine*, liberally to give away what was none of his, and what the other must purchase before they could enjoy: Sad was the Donation; for by virtue of that conveyance they became Conquerors of *Jerusalem*, and of the whole strength of the Christians.

† As it is consonant to Nature that my share of subsistence, which was before uncertain, should now be fixed, so it is necessary that the consent which others

gave to this at first, should stand fixed, especially if there was no obligation, declaration at the first to the contrary. *Vide Selden de Jure Nat. & Gen. ad m. Heb. id. obliget. quod est ex officio quod legis est*: But the sanction of a Law supposes the nullity of a State of nature, not of a right of nature.

V. But admitting that Planters may appropriate Plantation for their living, whether such may dispose of the same by Will (we supposing the Possessor for having no Heir) for that he might seem to have but an usufructuary possession, till a descent has been cast, which then perhaps may turn the same into a Right: † Without all controvesie the very immediate possessing and planting creates a right again all, but he that hath Empire there, and that very right the Party in his life time might have actually transferred over to another. Now though the devise in the Will operates not till after his death, yet the gift is made during his life; according as the *French* have it, *Se despoiller avant que s'en aller coucher*, that is, Man first puts off his cloaths, and then goes to bed.

VI. Again, Persons having arrived in those Territories, and planted, but before they have reaped the fruits of their labour, necessity is found within their Huts; and a supply of things for the support of humane life is wanting, whether such may find the means of subsistence by the Laws of Nature, and in case of refusal (after request) force them from their Neighbour Planter? Surely that which is necessary for any natural subsistence, and necessary to another, belongs justly to me, unless I have merited to lose the life which I seek to preserve. There would be a defect in Gods creating our natures, such as these are, if he did not provide means to uphold their beings, according to the natural faculties which he hath given them. A good Mother divides her bread among her Children, so as a morsel may come to each

*Pia mater-
nem inter libe-
ros distribuit,
ut fructus ve-
niat singulis.*

each; let us therefore judge this case by those rules of Justice, by which we judge other cases: If a Father in his Will pass by a Child or names him, but upon false causes leaves him nothing; he is notwithstanding by the equity of the *Civil Law* admitted to a Child's part, a *legitima*, and may form his Action *contra Testamentum inofficiosum*. Men are all a Kind, and we derive one from another, and to let others settle in our places, who may justly expect as much due to them, for their natural subsistence, as was to those who before went out of the World, to make place for them, yea though they assign them nothing at their departure.

Man were of all living Creatures most miserable if he might not during this life have that measure, which God would not have an Ox defrauded of; thus hath every Dunghil-Fly a right to live, and to remain insectile, which besides existence hath sense, and may not justly be deprived of that its chiefest felicity, unless it be importunate to a nobler Creature.

VII. 'Tis very true that no Man can pretend to share in the Sweat of another Man's Brows, or that the Pains, and wasting of another Man's life should be for the maintenance of any but his own; nay though it be granted, that those Neighbour-planters, who being settled before us, and having acquired either by Industry, or lawful donation, the fruits of other Men's labours, and consequently must enjoy more Plenty than a new Comer or Planter, yet all that they possess is not properly theirs; for if another by extreme necessity be perishing, and they have above what they can consume in a natural way, then they have no fuller a property in that plenty than Stewards have, and for this regard they are so called in Scripture: *The Earth still is the Lords, and the fulness of it is his, for he made it of his own matter, and for the Fashion of it used not our aid; yea, 'tis his Sun which still produces, and his Clouds which drop fatness*: We can only pretend the contribution of a little pains for that which is our natural share; so that in plain reason we may not expect to be otherwise qualified

P p

than

X *nephoi in*
the Answer to
the *Cynopenses*:
Ubi jus emendat
nobis non conce-
ditur sine in
Barbarico, sive
in Graciano
solo ubi qua o-
pus summus,
non per vim,
sed ex necessi-
tate: Expedi-
Cyri.

*Lessius, lib. 2.
cap. 12. dub. 12.
num. 70.*

2 Cor. 8. 13.

*Grotius de Jure
Bell. ac Pacis
lib. 2. cap. 2.
§. 7, 8, 9.*

*Leges humane
obligant uti
facta sunt, sci-
lices cum sensu
humana imbe-
cillitatis.*

than Stewards, for all that which is not probably necessary for our own subsistence, or for theirs, who subsist only by us: Wherefore if *Lazarus* ready to perish (not by fault, but by misfortune) had taken *Dives* his Crumbs, contrary to his will; yet he hath sinned no more than he who takes something which the Lord or Master hath given him, though the Steward contradict it: But if it so happen, that both the Planters are *in pari necessitate*, then *melior conditio possidentis*; or, as *St. Paul's* words are, when he excited the Churches Charity and Alms, for the Relief of the distressed Members of Christ, *Not* (quoth he) *that we should be straitned, and they bound.*

VIII. The will of those who first consented mutually to divide the Earth into particular possession was certainly such as receded as little as might be from natural equity; for written Laws are, as near as possible, to be interpreted by that; and therefore in cases of such extremities we are not without examples, of taking the Goods of one to supply the necessities of many: And therefore at Sea, if Provision begin to fail in a Ship, every one may be forced to bring out openly, what he laid in for his passage particular; so a Ship at Sea, having in distress Weather, spent her Sails, Cordage, and Anchors, meeting other Vessels at Sea, may take a supply of such as shall be wanting; but yet govern according to *St. Paul's* words, *So that such take straiten not the other Ship.* So when the Sea breaks in upon a Country, we may dig in the Neighbours grounds to make a Bank, without staying for the Owners permission, yea, tear down any Man's Hedge, or Fence, when the common passage is stopped: For in such cases of necessity humane Laws (as is mentioned afore) do not so much permit to expound their natural equity, and that which Men give to those who are so innocently distressed, who borrow life, only from the shadows of death; *picta se tempestate tueretur*, is not so properly a Charity to them as a Duty; and if he be a Christian that gives perhaps he doth more Charity to himself than to the Receiver.

IX. The reason of this Christian Charity or Communion, is as far above the the natural, as Christ himself was above Nature; this requires an equal beating of all Pulses, that as Fellow-Members we have homogeneous sense and palpitation; we are to divide Cruse of Oyl, and a few handfuls of Meal, with one of Christ's Flock, with an abandoned Creature; and what can be in more extremity than a poor Planter in a strange place, destitute for the present supports of humane life?

Nequicquam fundo suspiret nummus in imo.

And surely the violation of this *Jus Charitatis*, is less than theft in those who having extended fortunes, never defalcate a *Gibeonite's* Crust perhaps for a wandering Angel; these steal even the shipwrack'd man's picture from him, which as his whole inheritance he carried at his back, to move compassion, and the insatiable Sea of their Avarice and Luxury, they wreck him over at Land.

X. But this free primitive Communion had, and with its bounds, and its *quantum* in Contributions, as well as the natural, otherwise it might be fraudulent, and thieving: For they who possess but a little, would contribute it all, on purpose to share equally with those who possess very much, which would introduce a visible decay and ruine in all; as *serius* rightly observed * on *M. Hortalus* his petitioning an Alms for *Augustus Caesar's* sake, *Idleness would enfeeble, and Industry languish, if Men should entertain no fear, nor fear to themselves, but securely expect other Mens* *idleness, idle to themselves, and burdensom to us?*

* *Intenditur inquit. socordia languescet industria, si nullus ex se metus aut spes, & securi omnes aliena subsidia expectabunt, sibi ignavi, & nobis graves.*
Tacit.

Wherefore in the midst of that primitive Communion, we find that the Apostles went *domatim*, from house to house breaking of bread, therefore they even then retained by their houses in property; which property is supposed by the eighth Commandment, as well as it is by Christian Charity: For no man can steal, but by invading the right of another; as for Charity, it is necessary he have something of his own, to be able to fulfil its commands, and make a dole at his door; and it is very convenient that he give it rather with his own hand, than some publick Collectors, For Charity is hated most

Mat. 7. 11. *with the sense of its own action.* Moreover under the Law, Jews were commanded *to love one another themselves*; yet this Command took not away Property then, therefore it takes it not away now; notwithstanding we owe the use or usufruct of our Properties to the distressed, though our selves be the same time in distress, just as we are commanded, by the peril of our own lives, to endeavour to secure our Neighbours life, which is yet a Charge more transcendent than the other, by how much life is above a livelihood. And though the various Laws of Countries have variously provided punishment for those, who out of meer necessity take something out of another's plenty; yet that proves not the act to be sin, or repugnant to equity or conscience, but rather repugnant to the convenience of that Kingdom or Republick where the act is committed; and the true reason of the same is, lest thereby a gap might be laid open to Libertinism; besides reason of State, we know, considers not Virtue much as publick quiet and conveniency, or the Right which is *ad alterum*.

XI. We will now consider those things which God's, which yet are not his in such a strict rigorous sense, but that they lie open to the exception of our just necessities; hence that which is devoted as a Sacrifice to him, in case of necessity, may be made our dinner, witness the action of David. Wherefore the consequence of our Saviour's answer was very strong, when he defended his pulling the Ears of Corn in another's Field: That if it was lawful for David in his necessity to eat that bread which was provided for the Table of God, then much more was it lawful for him and his Apostles in their necessities to take a refreshing out of that which belonged to Man? By the Canon Law, if no other means can be found, the Vessels of the Altar may be sold to redeem those Souls who are entangled in misery and Captivity; and is there not good reason for it, seeing they serve but for the Souls of Men, and therefore the Souls of Men are more precious than they? Yea the Sacrifice it self,

Decretals of
Gratian, lib.
Synodus Nica-
nensis, Can.
Synodus Aure-
liacensis,
Can. Concilium
Toletanum.

what end is it, but to obtain a state of Piety for us?

Upon what hath been said, it may not seem an injury, if a Planter (wanting those things for the support of humane life) requesting a reasonable proportion of his Neighbour (having it to spare) with an intention to repay, if denied, by force to take the same from him; for that reason which creates a punishment in a settled Common-wealth, for the like actions, does in such places fail.

*Grotius de Jure
Belli ac Pacis
lib. 2. cap. 2.
§. 8, 9.*

P p 3

CHAP.

C H A P. VI.

Of the Jews.

- I. Of Considerations touching their various and several Forms of Government down till their total extirpation.
- II. Of their first coming into England, and when.
- III. Of their state and condition after their inhabiting here.
- IV. Of their Privileges and other Immunities in reference to their Monies and Charters.
- V. Of their Chests and Stars, and the manner of proceedings for the recovering of their debts.
- VI. Of their Charters and Immunities, and of the confirmation of the same.
- VII. Of the Consequences and Inconveniences that fell and were occasioned by reason of their Courts, as to the Ecclesiastical Cognizance.
- VIII. Of their power in erecting of Synagogues, and of the foundation of the House of Converts, now called the Rolls.
- IX. Of their Charter obtained of the Priesthood of all the Jews of England.
- X. Of Places totally exempted

- in England from their Society.
- XI. Of the Endowment of the Wives according to the Law of the Jews, and of their power of Excommunication each other.
 - XII. Of the real state and condition that they remained notwithstanding all their various and several immunities.
 - XIII. First, in reference to the Persons, being obliged to wear Badges or Tables on the Breasts, as notes of distinction, and having entered the Realm, could not depart without Licence.
 - XIV. Secondly, as to their Estate, the same being solely at the will of the King; for their death the same escheated; they could sue without leave or licence, the King might respite or release the same, and have nothing but what was solely at the devotion of the State; continued so till their total Banishment out of the Realm.

I. **S**ince the remainder of that mighty Nation which of old were elected a People peculiar are now by him that first chose them, dispersed over the face of the Earth, and are become the most politick of Traders now extant, having by their Industry cemented themselves into the principal Revenue and Traffick of the Universe, but more especially among those Nations who remain in darkness and in

the shadows of Death. It might not seem improper to examine how their condition stood of old in this Nation, what advantages and disadvantages they brought to this Realm, and how the Laws of the same stand in reference to the People at this day.

At the first the Fathers of their several Families, and the First-born after them, exercised all kind, of Government both Ecclesiastical and Civil, being both Kings and Priests in their own houses, they had power over their own Families, to bless, curse, cast out, disinherit, and punish with death, as is apparent by *Noah* towards *Cham*, *Abraham* towards *Hagar* and *Ismael*, *Jacob* towards *Simeon* and *Levi*, &c. In *Moses's* days then did this Prerogative of Primogeniture cease; and as *Aaron* and his Posterity were invested with the right and title of Priests, so *Moses* and *Joshua* governed the People in a kind of Monarchical Authority.

After *Joshua* succeeded Judges, their Office was of absolute and independent Authority, like unto Kings when once they were elected; but there were long vacancies and chasms (commonly) between the cessation of the one, and the Election of the other; yea, for the most part they seldom chose a Judge but in the time of great troubles and eminent dangers, which being over-past, he retired to a private life, much symbolizing with the *Roman Dictators*, and continued with them according to the computation of some 329 years. In the vacancies or distances of time between Judge and Judge, the greater and weightier matters were determined by that great Court of the Seventy called the *Sanhedrim*, in which respect the Form of Government may be thought Aristocratical; Kings succeeded the Judges, and they continued from *Saul* to the *Captivity*, that is about 500 years.

From the *Captivity* unto the coming of the *Messias*, which is thought to have been 536 years, the State of the *Jews* became very confused, sometimes they were ruled by Vice-gerents, who had not Supreme Authority in themselves, but as it pleased the *Persian Monarchs* to assign them; they were called

Heads of the Captivity, of which was *Zorobabel* and his Successors down to *Hosodias*, which were thought to have been of the Posterity of *David*; so likewise the other succeeding ten chief Governours under *Alexander the Great*, in the last of those ten Governments departed from the House of *David*, and was translated to the *Maccabees*, who descended from the Tribe of *Levi*, and from them the Sovereign Authority continued to *Herod the Ascalonite* his Reign, at which time our Saviour Christ was born according to *Jacob's Prophecy*: *The Scepter shall not depart from Judah, nor a Law-giver from between his feet until Shilo* (that is, the *Messiah*) *shall come*; which Scepter was given to *Judah*, that is, to the Twelve Tribes from the time of *Moses*, and that it was taken fully from them in *Herod's* time, and given to him who was a * *Profelyte*, and no ways descended from that holy Stock, for such was *Herod*.

Gen. 49. 10.

* A Jew is a name of profession, not of Country or

Nation. *Joseph Scaliger ex quo Casaubon, ad v. Baron pag. 19. & 39.*

Vol. 568, 569.

Their condition since the extirpation of their Commonwealth, and their dispersing over the face of the whole Earth, after the sacking of their Metropolis, is fully related by *Josephus*, *Eusebius*, and others, and what condition, and how used in most Nations they have been since then, is fully illustrated by *Heylin* in his *Microcosm*.

II. When they came first into this Realm is not certainly related by any of the Historians in their Writings of *British* or *Saxon* King's Reigns; however this certainly appears, that *William the Conqueror* translated the *Jews* in *Roan*, from thence to *London*, ob numeratum pretium, for a sum of Money given by them to him, who accordingly appointed them a place to inhabit and trade in, which being assigned them, they were under the Protection and Patronage of the King, and as his meer Vassals, their Persons and Goods being his alone, and that they could dispose of neither of them without his Licence; and this appears by that ancient Law related by Sir *Henry Spelman*.

Holinshed. Vol. 3. pag. 15.

Council. 683.

De Judæis in Regno constitutis.

Sciendum est quoque, quod omnes Judæi ubicunque in Regno sunt, sub tutela & defensione Domini Regis sunt; nec quilibet eorum alicui debiti se potest subdere sine Regis licentia. Judæi, & omnia sua Regis sunt. Quod si quisquam detinuerit eis pecuniam suam, perquirat Rex tanquam suum proprium, (or detinuerit eos, vel pecuniam eorum, perquirat Rex si vult, tanquam suum proprium) Sir Henry Spelman renders it.

III. These People after they had planted themselves in this Isle, and being thus protected, drove on the Trade and Traffick of the same with a mighty hand to such a height, that by the end of King Rufus's time, they became powerful, rich and numerous, and to that degree so zealous for their Religion, that they not only held open Disputes, but endeavoured to bring over by Monies the poor and needy to be of their Opinion. So high and insolent were they grown up in a short time, which continued till King Henry the Second's Reign, at which time their condition became a grievance to the Nation, by reason of their Oppressions, Murders, and Insolencies, which that King taking into consideration, banished the wealthiest of them, and the rest he fin'd at 5000 Marks. The most pernicious act of Murder which they were accused of, was, That Generally on a Good Friday they would, if possible, get a Child of Christian Parents, and crucifie him in derision of his Religion.

IV. King Richard after his return from the Holy Land, taking into consideration the necessities and traits that that expensive Expedition had reduced him, and being desirous to reduce the Monies and Estates of the Jews into such a condition, as if necessity should compel him, to seize on the whole; but before the same could be done, it was propounded that the King declaring his being sensible of the state and condition of the Jews, a means might be found out for the settling and peaceable driving of Commerce

Spelman Con-
cil. 623.

Joh. Bromton,
Col. 1048.

Gervasius Do-
robernensis in
his Chronica,
Col. 1043.

Fox Vol. I.
fol. 305.

Matthew Pa-
ris, fol. 641.
Rot. Pat. 41
H. B. m. 4.

num. 6. Col.

4. Instit. fol.

254.

Job. Brompton,

Collect. 1258.

Hollinshead Vol.

3. pag. 155.

Commerce between the Christians and them; whereupon Judges were appointed to hold Courts touching the Government of the Jews, and their Commerce was appointed out in these words:

All the Debts, Pawns, Mortgages, Lands, Houses, Re and Possessions shall be registred, the Jew who shall conceal any of these, shall forfeit to the King his Body, and the concealment, and likewise all his Possessions and Chattels; neither shall it be lawful to the Jew ever to recover the concealment; also six or seven places shall be provided, in which they shall make all their Contracts, and there shall be appointed two Lawyers that are Christians, and two Lawyers who are Jews, and two legal Registers, and before them and the Clerk of William of the Church of S. Maries, and William Chimilli shall their Contracts be made, and Charters shall be made of their Contracts by way of Indenture, and one part of the Indenture shall remain with the Jew sealed with this Seal, whom the Money is sent, the other part shall remain in the Common Chest, wherein shall be the Locks and keys, whereof the two Christians shall keep one key, and the two Jews another, the Clerks of William of St. Maries Church and William of Chimilli shall keep the third; and moreover there shall be three Seals to it, and those who keep the Seals shall put the Seals thereto. Moreover the Clerks of the said William, and William shall keep a Roll of the Transcripts of all the Charters; and as the Charters shall be altered, so let the Roll likewise; for every Charter there shall be 3 d. and one moiety thereof by the Jew, and another moiety by him to whom the moiety is sent, whereof the two Writers shall have 2 d. and the Keeper of the Roll the 3 d. and from henceforth Contract shall be made with, nor any payment made to the Jews, nor any alteration made of the Charters but before the said Persons or the greater part of them, if all of them cannot be present, and the aforesaid Christians shall have the Roll of the debts and receipts of the payments which from henceforth are to be made to the Jews, and the two Jews one, and the Keeper of the Roll one. Moreover every Jew shall swear upon

Roll, that all his Debts and Pawns, and Rents, and all his Goods and Possessions he shall cause to be enrolled, and that he shall conceal nothing, as is aforesaid; and if he shall know that any one shall conceal any thing, he shall secretly reveal it to the Justices sent unto them, and that they shall detect and shew unto them all falsifiers and forgers of Charters, and Clippers of Monies, when and where they shall know them, and likewise all false Charters.

This Chest was called *Arca Chirographica*, or *Chiror-* See Purchas's
gaphorum Judaeorum, and the Notaries and Registers of Pilgrimage,
them stiled, *Chirographi Christiani* and *Judei Arca Chi-* l. 2. c. 10. §. 7.
rographica London, Oxon. Or other such City where
such Chests were usually kept, all their Deeds, Obliga- It's conceived
tions, and Releases were usually called **Stars** and the Star-
Starra, *Stavrum*, *Star* in our Latine Records, from the Chamber was
Hebrew word (as Mr. Selden observes *Sbetar* contracted by the old Re-
the omission of *He*) which signifieth a Deed or Contract. ceipt where
These Stars were for the most part writ in the Hebrew the Chest for
Tongue alone, or else in Hebrew on the one side or top *Westminster*
of the Parchment, and in Latin on the other side or remained with
bottom of the Deed after the Hebrew. the Stars of
that City, and
not so called,

If any Christian, became indebted to any Jew by as it is mention-
such Star or Writing put up and reserved in his Chest, ned, Co. 4. Inst.
and paid not his Money at the day appointed, to 66. Some of
together with all the Interest where any Interest was re- them are now
served, then he sued forth Letters by way of Process a- extant in the
gainst him both for the Debt and Interest under the No- Treasury of
taries or Registers hand, to appear before the Justices the Exche-
specially appointed for the Government and Custody quer in King
of the Jews to recover the same; but yet such Jew *Johns* Reiga.
could not obtain such Licence till he had paid a Fine to *Vide Fine*
the King for the obtaining of such Letters, *unum Basan-* Rolls 6 *Johan.*
um, viz. *Basantum* for every pound, and such Stars were m. 17. and
of the nature of Judgments, upon which Extents were su- likewise in H.
d forth, and the Lands of the Debtors were seizable 3. & Ed. 1.
notwithstanding, in whose hands soever they came, af-
ter the Star was entred into*: And if it happened, that * *Fines* 9. *Joh.*
any Persons denied their Deeds, or any Controversie memb. 5.
did arise upon which there was any Tryal, the same
was by a Jury half of Christians, and the other of six
Such

Pat. pars 2.
An. 3 Hen. 3.
m. 1.

Such Stars or Chest-Judgments were assignable to Christians, together with the Extents upon them, and the Assignee might vouch over the Assignor to Warranty in such case. So likewise to the King they might assign over Debts to pay their Taxes.

VI. As this Politick Prince had provided this means for the discovering of their Estates, so did he from time to time award Commissions to Justices for the Tryal of Causes and Controversies that arose between Christian and Jew, and granted them divers Liberties and Privileges, which afterwards were confirmed by these two ensuing Charters of King *John*.

Chart. 2. Joh.
n. 49. Charta
Judæorum Angliae.

JOhannes Dei gratia, &c. Sciatis nos concessisse omnibus Judæis Angliæ & Normaniæ, libere & honorifice habere residentiam in terra nostra & omnia illa de nostris; & omnia illa quæ modo rationabiliter tenent in terris & feodis, & vadis akatis suis & quod habeant omnes libertates & consuetudines suas sicut eas habuerunt tempore predicti Regis H. Abi patris nostri, melius & quierius & honorabilius. Et si querela orta fuerit inter Christianum & Judæum, ille qui alium appellaverit ad querelam suam dicationandam, habeat Testes, scilicet legitimum Christianum & Judæum. Et si Judæus de querela sua Breve habuerit, Breve suum erit et testis. Et si Christianus habuerit querelam adversus Judæum sit iudicatus per Pares Judæi. Et cum Judæus obierit, non detineatur corpus suum super terram, sed habeant homines pecuniam suam & debita sua, ita quod nihil non disturbetur, si habuerit hæredem qui pro ipso respondeat & rectum faciat de debitis suis & de forisfacto suo. Et liceat Judæis omnia quæ eis appoztata fuerint sine occasione accipere & emere, exceptis illis quæ de Ecclesiis sunt & panno sanguine lento. Et si Judæus ab aliquo appellatus fuerit sine teste, de illo appellatu erit quietus solo Sacramento suo super librum suum, & de appellatu illarum rerum quæ ad Coronam nostram pertinent, similiter quietus erit solo Sacramento suo super Rotulum suum. Et si inter Christianum & Judæum fuerit dissensio de accommoda-
tiona

tionem alicujus pecun'æ, Judæus probatum Catallum suum, & Christianus lucrum. Et liceat Judæo quiescere vendere vadum, postquam certum erit, eum illud unum annum et unum diem tenuisse. Et Judæi non intrabunt implacitum, nisi coram Nobis, aut coram illis qui Curces nostras custodierint, in quorum Ballivis Judæi manserint. Et ubicunque voluerint, cum omnibus Catallis eorum sicut res nostræ propriæ, & nulli liceat eas retinere, neque hoc eis prohibere. Et præcipimus quod ipsi quieti sint per totum Angliam & Normaniam de omnibus Consuetudinibus & Cheoloniis & modulatione vini sicut nostrum proprium Catallum. Et mandamus vobis & præcipimus quod eos custodiatis, & defendatis, & manu teneatis, & prohibemus nequis contra Chartam istam de his supradictis eos in placitum ponat super forisfacturam nostram sicut Charta Regis H. Patris nostri rationabiliter testatur. Teste T. Humf. filio Petri Com. Essex, Willielmo de Hereford. Com. de Pemb. Henr. de Bohun Com. de Hereford. Robert de Turnham, Willielmo Brywer. &c. Dat. per manum S. Well. Archidiacon. apud Marleberg, decimo die Aprilis Anno Regni nostri secundo.

Johannes Dei gratia, &c. Sciatis nos concessisse, & præfati Carta nostra confirmasse Judæis nostris in Anglia, ut excessus qui inter eos emergerint, exceptis hiis qui ad Coronam & Justitiam nostram pertinent, & de morte hominis & mahemio, & de assultu præmeditato, & de fractura domus, & de rapto, & de Latrocinio, & de Combustione, & de thesauris, inter eos deducantur secundum Legem suam, & emendentur, & Justitiam suam inter seipsos faciant. Concedimus etiam eis, quod si quis eorum alium appellaverit de querela quæ ad eos pertineat, Nos neminem compellemus ad testimonium cuiquam eorum contra alium exhibendum, sed si appellator rationabilis & idoneus testis habere poterit, eum secum adducat. Si quod vero opus scelaratum & apertum inter eos emerit quod ad Coronam nostram vel ad Justitiam pertineat, sicut de prædictis Placitis Corone licet nulli eorum noscer appellator fuerit; Nos ipsam querelam faciemus per Legales Judæo nostros Angliæ.

Chart. 2. Joh. n. 53. confirmatio Judæorum de Libert. suis.

glia inquiri sicut Charta Regis H. Patris nostri rationabiliter testatur. Teste G. filio Petri Com. Essex, Willielmo Marechallo Com. de Pembr. Hen. de Bohun Com. de Hereford, Petro de Pratell. Roberto de Turnham, Willielmo de Waren, Hugo de Nevil Roberto de Veteri Ponte. Dat. per manum S. Well Archidiacon. apud Merleberg decimo die Aprilis Anno Regni nostri secundo.

Cok. 4. Instit.
fol. 254.

VII. This Court being thus erected for the Government of the *Jews*, under colour of the same there were many evasions found out to avoid the punishments which they justly acquired for their several delinquencies; and therefore when any of these *Jews* were convicted before any of the Ecclesiastical Judges for offences against an Ecclesiastical Person, or for Ecclesiastical things, or for Sacrilege, or for laying of violent hands upon a Clerk, or for Adultery with a Christian Woman, the Conusance of the cause was always avoided by the King's Prohibition, because (as was alledged) they had their proper *delegated Judges* who should and ought to have Conusance of such things; so that if a *Jew* happened to be convented before the Judges assigned for such things, upon denial of the same by the Person alone, the simple assertion of another *Jew* and of one Christian without the administering of any Oath they might have purged themselves, the proof of the Prosecutor being utterly rejected.

Matthew Paris
additamenta,
fol. 202, 207.

Decret Gratian
lib. 5.
Surius Concil.
Tom. 3. p. 726.

* John Stows
Chron. fol. 182.

† Decret. Gra-
tian. lib. 5.

Matthew Paris
Hist. Angl. fol.
393.

VIII. By the *Canon Law* no *Jew* could build or erect a Synagogue; for if he did, the same was seizable into the Crown: The like was so done in the Year 1231. when they had erected and new-built a curious Structure for a Synagogue, the same was taken into the King's hand *, and dedicated to the Blessed Virgin, and afterwards granted to the Brethren of St. Anthony of Vienna, and called St. Anthony's Hospital; but yet an old † Synagogue they might repair.

King Henry the Third finding that many of the *Jews* were converted to the Christian Faith, but yet were notwithstanding persecuted by their Brethren, erected a convenient House and Church, with all

nece

necessary accommodations, and called it by the name of the *House of Converts*, in which place, if any would live a retired life, they had all accommodations granted them for their lives, which place continued a House of Alms and Receptacle for the converted Jews constantly down till 18 Ed. 3. and then there proved a failure of such Converts, and the place became empty and ruinous; whereupon that Prince in the eighteenth year of his Reign granted the same House to other poor People who had nothing to live on, with the benefit and accommodation of the Gardens and other things, and an Alms of 1 d. a day out of the Exchequer to each poor Person: Which place one *William de Bunstal* being made Guardian of, and likewise at that time Master of the Rolls, afterwards obtained of that King to annex the same House and Chappel of the Converts to the Master of the Rolls and his Successors for ever.

The Constitution of this Society (when it was in being) was pursuant to the *Cannon Law*; for by that was decreed, reciting: *That in regard the companies of evil Men do often times corrupt even the good, how much more then those who are prone to vices? Let therefore the Jews, who are converted to the Christian Faith, have no further communion henceforth with those who still continue in their old Jewish Rites, lest peradventure they should be subverted by their Jewish Society. Therefore the Decree, That the Sons and Daughters of those Jews who are baptized, and that do not again involve themselves in the Errours of their Parents, shall be separated from their Company, and placed with Christian Men and women fearing God, where they may be well instructed, and grow in Faith and Christian manners.* And further the same Council it was decreed, *That if a Jew should have a Wife converted to the Faith, they should be forced, unless upon admonition the Husband would follow.*

IX. However these People having got footing for their Persons, soon obtained Licence notwithstanding against the expresse Canons, not only for the erecting of Synagogues, but also obtained a Charter, whereby was granted to one James of London, a Jewish Jew, the Priesthood of all the Jews throughout all England, and the same at large.

4. Concil. Tole.
do, Can. 59,
61, 62.

Grat. Dist. 28.
qu. 1. c. 29. c.
qu. 1.

Rot. 1 Reg. Jo-
hannis, part 1.
m. 28, Chart.
17. Vide Co. 2.
Inst. fol. 508.
the same at
large.

land, to have and to hold it during his life freely quietly, honourably and intirely, without molestation, trouble, or disturbance by any Jew or Englishman in the exercise thereof, &c. And in the very close of the same there is also granted That he should not be impleaded for any thing appertaining to him, but only before the King himself, or his Chief Justice. This Charter was made at Roan, from whence the Conqueror first transplanted these People into this Realm.

X. And though they obtained footing in most of the great places of England; yet some there were who obtained such favour as to be exempted of the Company, as *New-castle*, to which Corporation was granted, That no Jew from thenceforth should remain or reside in their Town during the Reign of King Henry the Third, or his Heirs; so likewise the of *Southampton*, *Winchelsey*, *Wicomb*, *Newberry*, *Berhamsted*, and other Places.

If a Jew dyed and left an Infant, the House descended to the Crown, until the same was redeemed by the Heir at full Age, and in the interim the King might grant the same till he came of Age, together with all his Goods, Chattels, Lands, Tenements and Hereditaments, and then upon payment of the Fines they had a special Writ of Restitution awarded to give them actual possession.

XI. By the Laws of England, if a Man dyed leaving issue divers Sons, the Lands descended to the eldest; but a Jew dying, leaving issue divers Sons, after the Fine paid to the King, they all inherit Lands, Goods and Chattels in a kind of *Coparcenary* *. So likewise by the Law of the Realm if a Jew died seized of Lands, his Wife could not by the Common Law, bring a Writ of Dower; yet she might bring a Complaint before the Justices assigned for the Jews in the nature of a Writ of Dower, and should there recover, nevertheless subject to answer the King a Fine, nay though the Husband was converted to the Christian Faith †.

† *Cok. 1 Inst.*
fol. 31, 32.

Claus. 28. H. 3. m. 4. dorso. Claus. 36 H. 3. m. 26. pro quadam Judea.

Selden. de successibus apud Hebraeos, c. 20.
* But that was by the establishment of the Justices appointed for the Jews.

The Power of Excommunication was granted the *H. 3. m. 34* Jews to excommunicate any of their own Profession; but the same could not be done by them without Licence.

XII. Notwithstanding all these Privileges and indulged Liberties which were granted to them by those Kings from the Conqueror to that their fatal year in 18 *E. 1.* yet they were in no other condition but most absolute Bond-slaves, and exquisite Villains; for their Names were enrolled in the King's Exchequer for the *Jews*, and they confined to live and abide only in such places as those several Kings or their Justices assigned for their Custody, should prescribe and allot them, from which they might not remove without special Licence, but always be resident, that so the King's Officers might on all occasions find both them and their Families, and then as often as the King's pleasure was, were they translated from place to place, and not suffered to have any habitation but where they had a common Chest, and where Taxes were imposed on them, or Debts were owing from them to the Crown, their Persons, Wives, Children, Infants, Families were imprisoned and sent to remote places and Castles, nay banished, executed, and put to Fines and Ransoms upon all such occasions as those Kings thought fit; they were sold either Person by Person or in whole-sale as Bondslaves or Villains in gross by the King, and mortgaged to those who would accept them as a pledge, or otherwise advance any Monies upon their Assignment.

XIII. And that they might be distinguished from others, they were obliged always to bear a Badge and Table on their outmost Garments, as well Females as Males, where-ever they rode or went, to distinguish them from Christians, with whom they were to have no intimate communion, nor could the Christians be Servants or Nurses to the *Jews* in any kind, their state and condition being such, that they were all of them meer Slaves and Servants to the King of one kind or other.

When they had entred the Realm, they were absolutely prohibited to depart without special Licence the which they hardly and but seldom could obtain and if they attempted it, the which they sometime would do to avoid the heavy Taxes that were laid on them, they were imprisoned and put to severe Fines and Ransoms.

*Claus. 15. Joh.
memb. 13.
Fine 7. H. 3.
memb. 2. part. 1.
Ebor.*

XIV. As for their Real and Personal Estate, it was wholly at the disposal of the King; for he might seize all their Lands, Houses, Rents, Annuities, Fees, Stars, Mortgages, Debts, Goods and Chattels whatsoever, and sell, grant, release and give them to whom he pleased at his pleasure.

*Claus. 5 Hen. 3.
m. 17. de dom.
Judaeorum.*

At their deaths their whole Estate, both Real and Personal, escheated to the King; neither could their Heirs or Executors, Wives and Kindred have or enjoy them without making Fines, Releases, and Compositions with the King for them.

*Claus. 7. Johan.
Reg. m. 26.
Claus. 9. Johan.
Reg. m. 5, & 6.*

And when they had occasion to sue or implead any Person upon any account, Real or Personal, they could not proceed till Licence obtained, which always was upon Fines made; and those very Actions after they were commenc'd he could stay, and the very debts which they prosecuted for, he might respice payment of Principal or Interest, and give what time he pleased; nay he could not only lower or lessen the sums mentioned in their several Charters but he might release them for ever; and though the King might pardon or release a Debt, yet he might notwithstanding revive * the same. And those publick Chests, the common Repository of all their Fortunes, they often seized and sealed up the same and disposed what of them they pleased to the King's own use, notwithstanding their Charters and Grants of Privilege, nay forced them sometimes to take and distrain one another under pain of perpetual Imprisonment, Banishment, Confiscation of all their Estates, and the most severe Penalties that could be inflicted, they living purely under an unnecessary and arbitrary will of those several Kings; and that which was the more to be admired, that if they turned Christians, they immediately upon their Conversion

** Claus. 35 H.
3. m. 5. dors.*

conversion forfeited all their Estates to the Crown. At
 length King *Edward* the First having sought all ways Hillar. An. 52.
H. 3. Rot. 9.
in the Exche-
quer.
 that might be to reform the exorbitant Usuries and
 Oppressions which they daily committed did through
 the earnest solicitation of the Commons publish an
 Edict in Parliament for their total and universal
 banishment, which accordingly was done, and the
 King at that time sent his Letters and Letters Pa-
 tents to several Sea-Towns, reciting, That he
 had prescribed a certain time for their departure
 out of the Realm, commanding them not to do,
 nor suffer any wrong to be done them, but to
 grant them speedy passage at their own costs and Cok, 2. Instit.
fol. 507.
 charges. After which prefixed time, if they were
 found resiant within the Realm, they were hang-
 ed *, and some of the Rents and Profits of their
 houses were disposed to pious uses, but all were * Matth
Westm. Flor.
Hist. An. 1200;
part. 2. fol. 381.
 generally seized into the Crown, and disposed
 and sold to the *English* by several Grants and Seals,
 under the Great Seal of *England*. Thus these Peo-
 ple having by their extraordinary Usury, Extor-
 sions, and Oppressions reduced themselves to be In the 20 year
of Ed. 1 there
of Ed. 1 there
 despisable, and then banished, and that by a Peo-
 ple too with whom if they had continued in love
 and friendship, and improved their Fortunes by Charta de Ju-
diciis Litera
Patentes de
domibus Ju-
daeorum conces-
sis post eorum
exilium de An-
glia, above an
hundred par-
ticular Patents
of the Sale of
their Houses.
 the Rules of Moderation, they in all probability
 might have continued and flourished, they hav-
 ing from the several Kings, from the Conquerour
 down to their Fatal year, as many large Patents
 Liberties and Franchises granted them, as e-
 ver were granted by any Christian Prince or
 state since the Extirpation of their Common-
 wealth.

But notwithstanding this, yet Commerce and
 traffick having now taught them a more exquisite
 way of enriching themselves, than by that cruel
 biting Trade of Usury, they have now got
 coming into the Realm, and do now flourish in as
 much a manner as of old, (though it is hoped not
 in that manner for which they justly procured
 their total banishment out of the same) and since
 we hath been so kind to them as to destroy these

Rolls and Monuments of their former Cruelty and Oppressions, and where their Banishment recorded (there being no other footsteps of same, nor of any other before 5 *Ed. 2.* to be found, they being totally lost; yet there are other records that have sufficient Recitals of the same, well as History to evince the truth, if in the contradicted) it is hoped that if they continue in Realm, that they will by their constant actions sult and do such things as may stand with the honour, Justice, and Good of the Kingdom.

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C H A P. VII.

Of Merchants.

Merchandizing, the same is honourable and profitable both to Prince and State.

The advantages that might accrue to Kingdoms, if the more Noble and richer sort applied themselves to the same.

Of the first Institution of the Company of Adventurers.

Of the Institution of that in England to the Indies.

Of the forming of that in Holland, to those parts.

Of the forming the like by the most Christian King to the same parts.

Of the Advantages and Disadvantages considered, in reference to reducing them to Companies.

How Merchants in England were provided for of old.

Of their Immunities settled by Magna Charta.

Of Merchant Strangers, whose Prince is in VVar with the Crown of England, how to be used in time of VVar, and the reasons why Merchant-Strangers ought to be used fairly.

XI. Goods brought in by them, the Monies raised how to be disposed according to the Statute of Imployment.

XII. Merchant-Strangers, made Denizens by Parliament, or Letters Patents, to pay as before they were so made.

XIII. VVhat things requisite that make a competent Merchant according to Law.

XIV. One Merchant may have an Account against his Partner, and if he dies, no Survivorship to be of the Estate belonging, or acquired in their Traffick.

XV. Of the Immunities which they claim by the Custom of Merchants, in reference to Exchange.

XVI. All Subjects are restrained to depart the Realm but Merchants.

XVII. Prohibitory Laws bind Foreigners according to the Leagues of Nations.

XVIII. The necessity and advantage that is incumbent on Merchants to preserve their Marks.

THere are certain Affairs which should be left to the poor and common People to enrich them, but there are others which they only can execute which are rich; as that at Sea by way of Merchandizing, which is the most profitable in an Estate, and to the which they should attribute more honour, than some do here at this day. For if in all Estates,

Estates they have thought it fitting to invite the Subjects by honour to the most painful and dangerous actions, the which might be profitable to the publick this being of that quality, that they should attribute more honours to those that deal in it: And if Nobility hath taken its foundation from the courage of Men, and from their valour, there is certainly a Vocation in the which there is so much required in this; they are not only to encounter and strive amongst Men, but sometimes against the four Elements together, which is the strongest proof that can be of the resolution of Man. This hath been the occasion that some have been of Opinion, that they should open this door to Merchants to attain to Nobility, so as the Father and Son have continued in the same Trade, and to suffer Noble-men who are commonly the richest in Estates, to practise themselves (without prejudice to their condition) in this of Commerce; the which would be more honourable unto them than to be Usurers and Bankers, as in Italy; or to impoverish themselves in doing nothing but spend, and make consumption of their Fortunes, and never gathering laying up.

Præter mercaturæ usum Naves rei militaris & tutanda in mari contra externam vim reipub. inservire cœperunt, Aristot. 7. Polit. 6. Mare & classis in bello esse tutelam reipub. ait Tacitus 5. Hist. Class. Imperii munimen a vocant Atheniensium legati apud Thucydem lib. 1. H. Orat. ad Lacædæmon. fortunæ Grecia in

navinum presidio sitas fuisse prædicant, ejus rei muri lignei Themistoclis abunde dem fecerunt, idem experientia satis hodie loquitur, Inde Cosmo Medicaro Jamare fuit dictum, Non habendum potentem qui potentie terrestri, non simul et navalem haberet conjunctam. Et Hispanorum est adagium, Regnum sine potestate sicut furnum absque igne: Præterquam quid navigationes cultui vitæ, & tum traditioni Coloniarum valetudine, & voluptati serviunt.

The most usual way of Buying and Selling Commodities, between Merchants beyond Seas, by Bills of Debt, or Obligatory, call'd Bills Obligatory, which are there by the Law Merchant Alienable or Assignable, tho' not by our Law, being held as *choses en Action* where no property can pass by Assignment or Alienation, tho' certainly it would be of great convenience, were they by Act of Parliament made Assignable, as by Custom their Bills of Exchange are by Endorsment. *Lex mercat. 71.*

The Form of such a Bill Obligatory.

I, A. B. Merchant of *Amsterdam*, do acknowledge by these presents to be truly Endebted to the Honorable C. D. English Merchant Dwelling at *Middleborough*, in the Sum of 500*l.* currant Money for Merchandize, which is for Commodities received of Him to my Contentment; which Sum of 500*l.* as aforesaid, I do promise to pay unto the said C. D. (or the Bringer hereof) within Six Months next after the Date of these Presents. In Witness whereof, I have Subscribed the same at *Amsterdam*, the 10th of July, 1704. *Stilo novo*. Sometimes, and in some Countries this Bill is Sealed, *Lex Mercat.* 74. Laws of the Sea, 585. And if such Bill be made beyond Seas, by 2, 3 or more Persons, as having bought a Commodity as Partners together, or taking up Monies together at Interest; wherein they Bind themselves all as Principal Parties or Debtors, yet every one is Bound to pay but his own Part, by the *Civil Law*, and Custom of Merchants, *Lex Mercat.* 75.

Merchants ought to be very wary and circumspect in their giving a Character one of another, as to their Credit in their Dealings as to each others Ability, lest unawares they become Sureties, where not so much as intended. To which end I shall cite a Case in *Lex Mercat. cap. 10. fol. 69*, which was this. A Merchant being at *Franckfort* in Germany, during the Mart-Fair there, went into a Merchants Warehouse to confer of some business with him; where he found another Merchant of his Acquaintance cheapening a Parcel of Silk Wares of the said other Merchant, to whom this Man (as seem'd) was unknown, whereupon the Seller of the said Silk-Wares, took occasion to ask of him, whether he were a good Man, and of Credit, who answered he was. So the Bargain was made, and the Goods delivered to the said Merchant, the Buyer, to the value of 460*l.* For the which he made a Bill Obligatory, Payable the next Fair following, at which time the Buyer not appearing, Demand was made of the Merchant that gave the Buyer the Character of being a good Man and of Credit, who

who in his Defence did alledge that what he said was but only a bare Character, and at most was but *Nudum Pactum ex quo non Oritur Actio*. And so not bound to pay the same, as having had no consideration for it. And upon Suit thereupon he was adjudged to pay the said 460 l. and all he had for a Recompence to reimburse himself, was the Buyer's Bill Obligatory made over to him, which proved of no avail, for that the Buyer became insolvent. Note this was by the *Civil Law* and general Law and Custom between Merchants. Tho' I conceive this would not in any wise avail in our Law, but thought fit to add this Case (being from so good an Author as a Caution to Merchants, how they give a Character of other Merchants, whereby they gain Credit to be trusted.

Action of Debt was brought by a *Concessit solveret* according to the Law Merchant and the Custom of the City of *Bristol*. *Godbolt*. 49.

Two Partners
one makes a
Factor.

If two Men be Partners of Merchandize in one Ship, and one of them appoints and makes a Factor of all the Merchandizes, both of them may have Writ of Account against him, or they may joyn in one Writ, *Tamen quare*, *Godbolt* 90. *Fashion cont.* *Atwood*.

Account by
one joint Fac-
tor for the o-
ther.

One joyn't Factor may account without his Companion by the Law of Merchants, for Factors are oftentimes dispersed, so as they cannot be both present at their Accounts, *Goore & als cont.* *Dawben* 2. *Leon*. 75. 76.

Sale by a Fac-
tor, to one that
becomes
Bankrupt.

A Merchant delivered *Kerfies* to be sold in *Spain*; the Factor sells them to one who becomes a Bankrupt (and there is a Law in *Spain*, that if the Factor enter this before a Register, and had a Testimonial that he shall be Discharged) we judge here that he shall be discharged. In *Capps.* and *Tuckers* cap. 2 *Rolls. Repts.* 497.

Account
against him.

Account for Goods receiv'd *ad Mercandizandum* good by Ch. Just. *Hales*. And tho' declared against a Receptor general; yet shall not answer other profits, and shall have charges as a Bayliff. *Burdet cont.* *Ibreele*. 3. *Keeble* 387.

Factor buys
generally.

If a Servant or Factor Buy Goods generally

Book III.

and doth not upon the Contract declare that he only Buyeth as Servant or Factor, he is chargeable in his own right *Degelder* against *Savory*. 2 *Keeble*

112. In Account 'twas held *per Curiam*, that if a Man delivers Money to his Bayliff or Factor to lay out for him in Commodities, he cannot bring an *Assumpsit*, but only an Account, for it may so happen, that the Factor hath laid out more Money than he hath received, 1 *vent.* 113. *Anonymous*.

Indebitatus Assumpsit for 1000 *l.* for Monies had and receiv'd, and also an *Insimul computasset*, upon Account; the 1000 *l.* became due; the Defendant pleaded the Stat. of Limitations. The Plaintiff replied that he is a Merchant, and the Proviso and exception for Merchants Accounts. By *Twisden, Rainsford & Moreton absente Keeling*, Stated Accounts between Merchants as this Case is, are not within the Proviso, but only Accounts Currant, *Webber cont. Tyrell.* 1 *Levins* 287. 2 *Keeble* 622. 2 *Sand.* 124. Where Judgment for the Defendant. Yet the Case of *Martin and Delboe*, 1 *Levins* 298. to the contrary upon an Account Stated between Merchants; yet the same Case, 1 *Mod.* 70. Judgment for Defendant, 2 *Keeble* 674. 1 *Vent.* 89. & 1 *Sid.* 465. See likewise the Case of *Farrington & Lee.* 1 *Mod.* 268. & 2 *Mod.* 311.

II. Hence will grow many advantages both to the publick and private: To the publick, for that they that should deal in Commerce, having Means, Courage, and Sufficiency for this Conduct, it would be far greater in the furnishing more Ships to Sea, and better armed, the which the State at need might make use of for the safety of the Publick, and would add to the reputation of the Nation in all parts, they knowing that an Indignity or Damage offered to such, would require satisfaction with a strong and powerful Hand; the which they cannot do, who being poor, and having but small stocks, or what they borrow from Bankers, or are indebted for the Cargo which they send forth, have not the Courage to hazard themselves and their All in an Enterprize that is great. Besides, such who have honour, riches,

Where Ac-
count, not *Assumpsit* lyes against a Factor.

Merchants
Account Stat.
of Limit. plead-
able.

riches, and courage, would keep up the reputation of their several Commodities, by not lessening the Market, whereas the poorer sort, (to pay Customs, Freight, Bills of Exchange, and other contingent and necessary charges, which accompany the importing and exporting,) are often forced to sell for an inconsiderable gain; nay, some rather than their Wants should be known, will for ready Money sell their Goods for even less than they cost: All which would be prevented, if such Persons of value would apply themselves to a prudent management of the same; for whatsoever hazard they run, there would be more gotten by such in two, than by the poorer sort in three or four Voyages, and by that means it would be the occasion of avoiding many expences, and prevent the importing their Prince for Places, when perhaps they might get more at Sea in one year, than in ten at Court. Besides, experience hath taught, and doth daily manifest, that where the most Substantial have dealt in Commerce, it hath enriched both them and the State under which they lived; and this present practice of the *Venetians*, *Portugals*, *Spaniards* and *Hollanders* plainly demonstrates.

Arbitrament,
made a Rule
of Court.

Stat. 9, 10 W. 3. C. 15. Of ending Suits by Arbitrament. After the 11th of May 1698. All Merchants and Traders and others desiring to end any Controversie, Suit or Quarrel, for which there is no other Remedy but by personal Action or Suit in Equity, by Arbitrament, may agree, that their Submission of the Suit to the Award or Umpirage of any Person or Persons should be made a Rule of any of his Majesties Courts of Record, which the Parties shall chuse, and may insert such their Agreement in their Submission, or the condition of the Bond or Promise; and upon producing an Affidavit of such Inserting, and upon Reading and Filing such Affidavit in the Court so chose, the same may be entred of Record, that the Parties shall submit to, and finally be concluded by such Arbitration or Umpirage. And in Case of Disobedience thereto, the Party neglecting or refusing, shall be Subject to all the Penalties of contemning a Rule of Court.

Court, and Process shall Issue accordingly, which shall not be stopt or delayed, unless it appear on Oath that the Arbitrators or Umpire misbehaved themselves, and that such Award was corruptly or unduly procured. In which Case such Arbitration or Umpirage shall be void and set aside by any Court of Law or Equity, so as such corruption or undue Practice be complained of, in the Court where the Rule is made for such Arbitration; before the last day of the next Term, after such Arbitration made and Published to the Parties.

Which Clause may be to the purpose following, at the end of the Condition, *viz.* And the above-mentioned *A. B.* doth agree and desire that this his Submission to the Award above-mentioned be made a Rule of His Majesties Court of King's Bench, pursuant to the late Act of Parliament, for this purpose provided.

The like for the other Party submitting to such Award.

A Submission was to an Award by Bond, and at the End of the Condition of the Bond was this Clause: *And if the Obliger shall consent that this Submission shall be made a Rule of Court, that then, &c.* Upon Motion to make this Submission a Rule of Court, it was opposed, because these words do not imply his Consent; but if he would forfeit his Bond, he need not let it be made a Rule of Court; yet because this Clause could be inserted for no other purpose, the Court took these conditional Words to be a sufficient Indication of Consent, and made the Award a Rule of Court.

A Matter was referred by Consent at *Nisi prius* to the three Foremen of the Jury; and before the Award was made, one of the Parties served the Arbitrators with a *Subpœna* out of Chancery, which hindered their proceeding to make the Award. And the Court held this a Breach of the Rule, and granted an Attachment, *Nisi Causa*.

Upon a Submission to the Award of the three Foremen of the Jury, who made their Award, the Defendant moved to set it aside; because they went on without giving him Time to be heard, or produce a Wit-

a Witness: And *Holt* Chief Justice said, the Arbitrators being Judges of the Parties own chusing, the Party shall not come and say they have not done him Justice, and put the Court to examine it: *Aliter*, where they exceed their Authority: however the Award was examined and confirmed, and the Plaintiff moved for an Attachment for not performing it, and the Court held, that the Non-performance while the Matter was *Sub Judice*, was no Contempt: then the Plaintiff moved for his Costs, and that was denied; upon which *Powel* Justice said, that seeing they could not give the Party any Costs, he should never be for examining into Awards again.

Salk. 73. pl. 12.

H. Bound himself in a Bond to stand to the Award of *J. S.* which Submission was made a Rule of Court. The Party for whose Benefit the Award was made, moved the Court for an Attachment for *Non-performance*, which was granted: pending that he brought an Action of Debt upon the Bond; upon this Serjeant *Darnell* moved that he might not proceed both ways; and likened it to the Cases, where the Court stays Actions on Attorneys Bills, while the Matter is under Reference before the Master. *Scd per Curiam*, the Motion was denied, and this Difference taken: where the Court relieves the Party by way of amends in a summary way, as in the Case cited, there it is reasonable; otherwise here, where the Plaintiff has no Satisfaction upon the Attachment, and the Defendant was put to answer Interrogatories.

Salk. 87. pl. 1.

Attachment lies not for not performing an Award made upon a Rule of Court without a Personal Demand. *Holt* Chief Justice remembred the first Attachment of this kind was in Sir *John Humble's* Case in *Kelyng's* Time, in which, and ever since, a Personal Demand has been thought necessary. In such Cases of Awards, tho' they be not legally good, an Attachment lies for Non-performance, *aliter* if impossible but the Party is excused as to that part which is impossible only.

Salk. 84. pl. 3.

If a Rule be made at *Nisi prius* to refer a Matter to the three Foremen of the Jury, and that the Plaintiff may either enter upon Judgment on the Verdict

or have an Attachment for not obeying the Rule of Court, it being in his Election which way he will execute the Award; and this was affirmed by Mr. *Northey* and at the Barr to be the constant practice. *Tourton* and *Gould* (in the Absence of the Chief Justice) doubted of it, because the Verdict stood still on Record; to which Mr. *Northey* answered, there could not be a Judgment entred on such Verdict without Leave of the Court: And the Attachment was granted.

III. The consideration of which first gave light to that industrious Nation the *Burgundians*, to procure the Association or Incorporation by *John Duke of Brabant*, of that ancient Company of the Adventurers, *Anno* 1248. which were then called the Brotherhood of *St. Thomas Becket of Canterbury*; which being afterwards translated into *England*, was by *Edward the Third* confirmed, and by his Successors *Henry the Fourth*, *Henry the Fifth*, *Edward the Fourth*, *Henry the Sixth*, *Richard the Third*, and King *Henry the Seventh*, who gave them the name of Merchant-Adventurers, and from him successively hath their Charter been confirmed down to, and by his Sacred Majesty that now is; and as this Society is of ancient estimation, so is their Government very commendable.

IV. The Society of the Company, trading to the *East Indies*, differs from others, both as in reference to the Persons and Members, which are at this day many of the principal Nobility of *England*, as also for that their Adventurers run all into many Stocks, and is governed and carried on jointly upon benefit and loss; they were incorporate *Anno* 1599. and since they surrendered their Charter, and accepted a new one, and are incorporated by the name of *Governour*, and *Company trading to the East-Indies*; their Adventurers run all into one general Stock, and is governed and carried on upon benefit and loss; the same being at this day, according to the Subscriptions, about four hundred thousand pounds, which the several Persons Subscribers may sell, transfer, and dispose of; but they can no ways take out the same;

same: The *Great Stock* may be increased, if the Company shall see occasion to permit it; but they are very cautious of the same, for that the greater the Dividends, the more Reputation the Stock bears, which above all things is to be maintained; however directly upon his own account, no Person can have above ten thousand Pound Stock there, nor can he have a compleat Title, till he is made a Free-man of that Society; their Returns are very profitable, and of late very rich, and have many places of great importance in *India*, as *Mesopotam* on the Coast of *Cormandel*, *Bombay*, *Surat*, Fort of *St. George*, *Bantam*, &c.

V. The *Dutch* having found relief in their distress from the *British* shore, against their powerful Enemy, found also a pattern to carry on Commerce; they not being wanting in the imitating the Incorporation of a Company, trading to those Places which they possessed in the *East-Indies*; and therefore in the year 1602. leave was granted from the *States* to Traffick into those Parts before all others, during the space of one and twenty years, the which was granted them, in consideration of five and twenty thousand Florins, which they promised to pay to the *States* during the first ten years. Thus reduced all into one Company, *Amsterdam* had one moiety, *Middleburgh* in *Zealand* a fourth part, *Delph*, *Rotterdam*, *Horne*, and *Enchusen* had each of them a sixth part, the whole Stock of this Union amounting to six Millions of Livres, or six hundred thousand pound Sterling.

For the direction of this Trade, and the Interests of the Associates, they have established in either of those Towns, a certain number of Administrators, at *Amsterdam* twenty, at *Middleburgh* twelve, in either of the rest seven; and if any one dies, the Chamber of the Place names three, of which either the *States-General*, or the Magistrate of the Town chuseth one.

Those

Those Chambers chuse seventeen among the Administrators, that is to say, *Amsterdam* eight, *Middleburgh* four, *Delph* and *Rotterdam* two, *Horne* and *Enchusen* two; and the Seventeen are chosen alternatively, sometimes at *Middleburgh*, sometimes at *North-Holland*; the which are called together to resolve jointly of how many Ships, and of what Equipage and Furniture they shall make the Fleet, which they mean to send, and to what Fort or Coast they should go. This Assembly is held six Years together at *Amsterdam*, and afterwards two Years at *Middleburgh*, and then again at *Amsterdam*; by the Conditions of the Accord the Ships must return to the same Port from which they parted; and the Spices which are left at *Middleburgh*, and other Chambers are distributed amongst them by the weight of *Amsterdam*, and the Chamber which hath sold her Spices, may buy from other Chambers.

By this Order * they have hitherto continued this * There are now some variations.
Commerce with reputation, not as simple Merchants only, but as if they were Sovereigns, they have made in the Names of the *States*, Alliances with many of the Princes of those parts; as with the Kings of *Siam*, *Quadoen*, *Patam*, *Johor*, the Heir of *Mataco*, *Bornean*, *Achin*, *Sinnatra*, *Baretan*, *Jocotra*, and other King's of *Fatta*; they have made themselves absolute Masters of the Island of *Amboyna*, but by what means? — Where they have a President who governs in their name; at *Banda* they have Fort for a retreat, where they must deliver the Spices at a certain price; in *Trinate* they have another a Mile distant from that of the *Portugals*; at *Magniene* they have three; at *Motire* one; at *Gilolo* they have taken that which the *Portugals* have built; and indeed whatsoever either can, or may consist with their Interest in those parts, they have ingrossed, and by that means almost the Trade of the whole Spices of the *East*.

VI. So likewise the most Christian King hath within few years established such another Trading to those *Eastern* Parts.

And in *England* we have several others, as that of Trading to *Turkey*, that of *Africa* to *Guiney*, and several

ral others, dividing the several Trades according to the Coasts and Places where they are appointed, forbidding them to intrench or incroach on each other; so likewise to all other his Majesties Subjects on severe Penalties.

VII. Now it is not the dividing of the Trade into Companies that can answer the expectation, but it is the dividing the Trade into Companies, where the places may bear it; as that to the *Indies*, *Turkey*, *Hamborough*, and some others: But to some others as the *Canaries*, *France*, or any of those places on this side the Line, it has been conceived the Trade will not answer it, but the same would be better distributed, either into the Trade of voluntary Associations, or single Traders; others perhaps would result into Monopolies, if incorporated; however the Standard Rule is to know whether the Trade of the Place will bear a Company, or not.

It is Foreign Trade that is the main Sheet Anchor of us Islanders, without which the Genius of our useful Studies, and the which renders Men famous and renowned, would make them useless and insignificant to the Publick. When Man has fathomed the bottom of all Knowledge, what is it, if not reduced to Practice, other than empty notion? the Inhabitants of this Island were learned in all the Languages between the rising and setting of the Sun, did know and understand the situation of all Places, Ports, and Countries, and the nature of all Merchandize and Commodities, were acquainted with the Order and Motion of all the Stars, knew how to take the Latitude and Longitude, and were perfectly read in the Art of Navigation, to what purpose would all be, if there were no Foreign Trade? We should have no Ships to navigate those Countries, nor occasion to make use of those Languages, nor to make use of those Commodities: what would this Island be without Foreign Trade but a place of Confinement to the Inhabitants, who (without it) could be but a kind of Hermites, being separated from the rest of the World; it's Foreign Trade that renders us rich, honourable and

great, that gives us a Name and Esteem in the World that makes us Masters of the Treasures of other Nations and Countries, and begets and maintains our Ships and Seamen, the Walls and Bulwarks of our Country; and were it not for Foreign Trade, what would become of the Revenue (as one hath ingeniously observed) from six to eight hundred thousand Pounds for Customs, and would the Rents of our Lands be? The Customs what would totally fail, and our Gentlemens Rents of thousands *per annum*, would dwindle into hundreds.

*Les avantages
des Com-
merces de la
East-India.*

VIII. Merchants in England were always favourably provided for by the Common Law of this Kingdom. By the ancient Laws of King Alfred it was provided, *Defendue fuit que nul Merchant-Allen* *Mirour, cap. 1.*
ne bantast Anleterre, forsque au quarter faïres, *Señ. 3:*
ne que nul demeurast in la terre outer quarante *Intr. leges*
jours: Mercatorum navigia, vel inimicorum quidem *Esbel. cap. 24*

utrumque ex alto (nullis jactata tempestatibus) in portum aliquem invehentur tranquilla pace fruuntur, quin etiam si maris acta fluctibus, ad domicilium aliquod illustre, ac pacis beneficium donatum navis appulerit inimica, atque istuc nauta confugerunt, ipsi & res illorum omnes augusta pace potiuntur.

IX. Again, by the Grand Charter of our Liberties, they are provided for in these words: *Omnes* *Magna Charta,*
cap. 30.

Mercatores nisi publice antea prohibiti fuerint, habeant saluum & securum conductum, lexire de Anglia, & venire in Angliam, & morari, & ire per Angliam tam per terram, quam per aquam, ad emendum vel vendendum sine omnibus malis tolnetis per antiquas & rectas consuetudines præterquam in tempore guerra. Et si sint de terra contra nos guerrina & sales in veniantur in terra nostra in principio guerra, attachentur sine damno corporum suorum, vel rerum, donec sciatur nobis, vel a Capitali Justiciario nostro, quomodo Mercatores terra nostra tractantur, qui nunc inveniuntur in terra nostra contra nos guerrina; & si nostri salvi sint, ibi alii salvi sint in terra nostra.

1. By which it is declared, that all Merchant-Strangers might be publicly prohibited to Trade into this Realm, be they in Amity, or otherwise.

2. All Merchant-Strangers in Amity, except such as be so publicly prohibited, shall have safe and sure conduct in seven things.

*Addit Canon,
Mercatores,
quod non tan-
tum de his qui
temporariam
in hostico mc-
ram agitant,
intelligendum
est, sed ut de
subditis perpe-
tuis; nam &
horum vita ab armis aliena: Est ac sub hoc nomine continentur simul alii opifices & arti-*

fices quorum questus pacem amat, non bellum. Grotius de Jure belli lib. 3. cap. 11. §. 12.

1. To depart out of
2. To come into
3. To tarry in
4. By Water and Land to go in, and through
5. To buy and sell.
6. Without any manner of evil Tolls.
7. By old and rightful Customs.

} England.

X. But concerning such Merchant-Strangers, whose Prince is in War with the Crown of England, if they are found within the Realm, at the beginning of the War, they shall be attached with a Privilege and Limitation, *i. e.* without harm of Body or Goods; with this limitation, until it be known to the King, or his

* That is, the Chief Justice *, how Merchants of England are used and intreated in their Country, and accordingly they shall be used in England, the same being *Jus Bilei*. But

Et in Republica maxime confer- vanda sunt ju- ra Belli. Co. 2. Instit. fol. 58. for Merchant-Strangers that come into the Realm after War begun, they may be dealt withal as open Enemies it being the Policy of England ever to entertain Mer- chant-Strangers fairly. In the 18th year of Ed. 1. in the Parliament Roll it is contained thus: *Cives London*

Rot. Pavliam. 18 E. 1. fol. 4. num 55. *petunt quod alienigeni Mercatores expellantur a Civitate quia dicantur ad depauperationem Civium, &c. — Respon- so — Rex intendit quod Mercatores extranei sunt idonei & utiles magnatibus, &c. & non habet Concilium eos expel- lendi.*

Rot. Vascon. 18 Ed. 2. m. 21. However, though great Immunities were granted them, yet they always found Sureties that they should not carry out the Merchandize which they brought in.

XI. And at this day, if they bring in any Merchandize into the Realm, and sell the same for Monies, they are to bestow the same upon other Merchandizes of England, without carrying of any Gold or Silver in Coyn, Plate or Mass out, on forfeiture the principal reason of this was as well to preserve and keep the Gold and Silver within the Realm, as for the increase of the Manufactures; and the same

4 H. 4. cap. 5.

5 H. 4. cap. 9.

at this day extends as well to Denizens, so made by Letters Patents, as Strangers; however he may use the same in payment to the King's Liege People, without incurring the Penalty of the Statute of 4 H. 4. but yet in strictness of Law, ought not to receive * any Gold in payment.

XII. All Merchant-Strangers that shall be made Denizens, either by the King's Letters Patents, or by Act of Parliament, must pay for their Merchandize like Custom and Subsidy, as they ought, or should pay before they were made Denizens.

XIII. Every one that buys and sells, is not from hence to be denominated a Merchant, but only he that trafficks in the way of Commerce, by Importation or Exportation; or otherwise in the way of Reception, Vendition, Barter, Permutation, or Exchange, and which makes it his living to buy and sell, and that by a continued assiduity, or frequent negotiation in the Mystery of Merchandizing: But he that buy Goods to reduce them by their own Industry into other Forms than formerly they were of, are properly called Artificers, not Merchants: but Merchants may, and do alter Commodities as they have bought them for the more expedite Sale of them, but that renders them not Artificers, but the same part of the Mystery of Merchants; but Persons buying Commodities, though they alter not the Form, yet if they are such as sell the same at future days of payment at a greater price than they cost them, they are not properly called Merchants, but are Usurers, though they in several other names, as Ware-house-Keepers, and the like; but Bankers and such as deal by Exchange, are properly called Merchants.

IV. The Wares, Merchandizes, Debts or Duties of Merchants have as joynt Traders, or Partners, shall not go to the Survivor, but shall go to the Executor of him that is deceased (a) And the Executor may sue in an Action with the surviving Merchant, 2 Le. 88. Hall against Haffam.

R 1 2

Mercatores per beneficium commercii locum non habent

Sed Quare, for it hath been since held, that the Executor and Survivor cannot sue for the Remedy Survivors, tho' the Duty doth not; and therefore on Record must be accountable to the Executor for that. *Martin v. Crum* 5. 11. 414

* Stat. 17. E.
4. c. 1. confirmed by 3. H. 7.

c. 8.
* 8 H. 6. c. 14.
11 H. 7. cap. 14.
22 H. 8. cap. 8.
1 Eliz. cap. 1.
Co. 2. Inst. fol

742.
Leg. anic. Cod.
de nund. & Al-
teat. in Leg.
mercis 66. &
in Leg. mercis
207. de verb.
signif.

C. ejiciens 88.
aist.

Paul de Castr.
in Leo. cum ff.
de Inst.

38 E. 3. 7. Co.
on Littler. fol.
182. per Le-
gem mercato-

Ifriam jus. ac-
crescenti inter

If two joint-Merchants occupy their Stock, Goods, and Merchandize in common to their common profit, one of them naming himself a Merchant, shall have an account against the other naming him a Merchant; and shall charge him as *Receptor* * *denariorum ipsius B. ex quo cunque causa & contractu, ad communem utilitatem ipsorum* *A. & B. provenient sicut per Legem Mercator iam rationabiliter monstrare poterit, 10. H. 7. 16. a.*

* *Co. sup. Litt. fol. 172. lib. Intrat. fol. 17. 18. 19. F. N. B. 117. D.*

Lex Oleron.
Partners of a Ship disagree.

If there be several Owners of a Ship, and they fall out, the Ship notwithstanding this Variance may make one Voyage upon their Common Charge and Adventure, before such time as they shall be so much as heard to dissolve the Partnership; but if after that they cannot agree, he who desires to be Free, is to offer to the rest his Part at a Price, as he will either give or take; which if he will not do, and yet refuses to sell the Ship, forthwith the rest of the Owners or Partners then may Refuse the Ship at their own Charge, and upon the Adventure of the Refuser, so far as his Part doth extend, without any Account to be made unto him of any Part of the profit at her Return. But they are bound to bring the Ship Home safe, or to answer him the value of his Part: But if the Persons Partners who have the greatest Share in the Part of the Ship refuse to continue the Partnership, without one who hath but one Part or a small Share in the Ship, who cannot sell or part with his Part at a Price set, without great Loss, nor is of Ability to Buy their Parts, then are they all Bound to put the Ship to an Appraisement, and so dispose of her by Sale, or setting her forth for the Voyage according to such Appraisement. And for want of Buyers, the poor Partner can neither avoid the Oppression of the Richer, nor yet the Rich satisfy the poor Man, who also may be obstinate and will not sell; then may the Judge of the Admiralty, Sentence or decree the same, as he may do in *Omnibus aliis bonæ fidei Actionibus. Lex Mercat. 120, 121.*

Action against one when two promised.

In an Action upon the Case against *A.* the Plaintiff declares upon the Custom between Merchants, That if two Merchants are found in arrear upon an Account, and they promise to pay it at certain Days, that any or either of them may be charged for the whole singly; and then shewed the account that

and B. were found in Arrear so much, &c. And promised to pay it at certain Days, but did not, and the Plaintiff brought his Action against A. only, and resolved that it lay. *Child against Guyot*, 2 Rolls Abr. 702.

703.

If two Merchants have a joint Trade, and one of them accept a Bill of Exchange, if he do not pay it, an Action lyes against the other, *per Twisden*, Stiles 370. but rather against both.

XV. And as the Law establishes security for their Estates, so it gives them other Immunities in their Commerce; for if one Merchant draws a Bill of Exchange upon another, be it in-Land or out-Land, (if it be by way of Exchange) the acceptance of the Bill by the Party shall bind him to that Party, to whose use the Money in the Bill is to be paid, and he may bring his Action in his own name, *per Legem mercatoriam*. *Martin versus Bouz. 1 Jac. B. R. 2. Cro. fol. 7.*

And so it is, if a third Person, that is a Stranger to the Bill, shall accept the same for the honour of the change. *Drawer*, it shall bind him as effectually, as if he upon whom the Bill was drawn had accepted it; and this by the Custom of Merchants. *Lutw. 891. b.*

Merchandize is so Universal and Extensive, that it is in a manner impossible, that the Municipal Laws of any one Realm should be sufficient for the ordering of Affairs and Traffick relating to Merchants. The Law concerning Merchants, is called the Law Merchant from its universal Concern, whereof all Nations do take special Knowledge, and the Common and Statute Laws of *England*, takes notice of the Law Merchant, and leave the Causes of Merchants in many Instances to their own peculiar Law. As in the 13 Ed. 4. 9, 10. A Merchant-Stranger made Suit before the King's Privy Council, for certain Bails of Silk feloniously taken from him, wherein it was moved that this matter should be determined at Common Law; but the Lord Chancellor answered, that this Suit is brought by a Merchant, who is not bound to sue according to the Law of the Land, nor to tarry the Tryal of 12 Men. And it was there likewise resolved

by all the Justices, that if the Merchandizes of such a Merchant Stranger be stolen and waved by a Felon, the King himself shall not have them as Waifs, otherwise of the Goods of a Common Person. *Vid.* 27 *Ed.* 3. *cap.* 20.

In War, Merchants in an Enemy's Country, are privileged from any Violence to be offered them, *Grot. de jure belli & pacis. lib.* 2. *cap.* 11. *sect.* 12.

There are likewise (for the accommodation of Commerce and Traffick) in all Countries, privileged Ships and Boats serving the Country or the Prince; which have great Prerogatives of being Free of Imposts and Customs, and not subject to Arrests. And all Ships are subject to this Service upon Command, and if they refuse, the Ships are forfeited, by the Law *Maritime, Lex Mercat.* 110, 111.

If a Merchant commit any Offence, for which he is to be Amerced, this Amercement, shall be *Salva Merchandizi sua*. For that Trade and Traffick is the Livelyhood of a Merchant, and the Life of the Commonwealth, wherein the King and every Subject hath an Interest. *Magna Ch. cap.* 14. 2 *Inst.* 28.

By the *Stat.* of the 5 *H.* 4. *cap.* 7. Merchants Alien shall be used in this Realm as Denizens be in others.

To call a Merchant Alien Bankrupt is Actionable. *Turlott cont. Morrison. Tel.* 193. 1 *Bulst.* 134.

A Man delivered Kersies to be sold in *Spain*, the Factor sells to one who becomes a Bankrupt, and it is a Law in *Spain*, that if the Factor enter it before a Register and had a Testimonial, that he shall be discharged. And the Court said we will judge here, that he shall be discharged. *Caps and Tucker.* 2 *Rolls Rép.* 497.

Debt upon a Bill by a Merchant to pay Foreign Coin amounting to so much, to be paid upon the Feast of the Purification called *Candlemas day*. Upon *non est factum* pleaded, *Verdict* for the Plaintiff. Moved in Arrest of Judgment, that the Declaration was not good, because Payment at *Candlemas* is not known in our

our Law, yet the Judgment was affirmed, for that amongst Merchants. such Payment is known to be on the 20th of February, and the Judges ought to take notice of it, being used among Merchants, for the maintenance of Traffick, *Perrison* and *Pounteys Case*, Tel. 135. 1 *Brow.* 103.

XVI. All other Subjects are restrained to depart the Realm, to live out of the Realm, and out of the King's Obedience, if the King so thinks fit; but Merchants are not, for they may depart, and the same is no contempt, they being excepted out of the Statute of 5 R. 2. cap. 2. And by the *Common Law* they might pass the Seas without Licence, though not to Merchandize. Mich. 12 &
12 Eliz. Dyer.
fol. 296. Pasch
23. Eliz. fol.
375.

XVII. It was once conceived, that those Laws which were prohibitory against Foreign Goods, did not bind a Merchant-Stranger; but it was ruled otherwise: For in the Leagues that are now established between Nation and Nation, the Laws of either Kingdom are excepted; and therefore as the *English* in *France*, or in any other Nation in Amity, are subject to the Laws of that Country where they reside; so must they of *France*, or any other Country be subject to the Laws of *England*, when resident here; and therefore if a *French-man* imports any Points, Laces, Belts, Hats, and the like, they are forfeited. 19 H. 7.

*Tomlinson qui
tamvers. Henry
de vale, Pasch.
26 Eliz. in the
Exchequer.*

XVIII. The marking of Goods is of a great consequence, as in relation to the settling the property of the Merchandize in the right Owner; and in Courts of Justice, both the *Civil Law* and the *Common Law* hath a great respect to the same, therefore the use has been, that every particular Merchant hath his particular Mark appropriated to him; by which means, if the Person is of any value considerable, as in relation to Commerce, his Mark is presently known.

Every Merchant is to set down his Mark upon his Book of Accompt, wherewith his Commodities are marked; so Companies and Societies have their particular Mark: No Merchant ought to use another Mark, without leave first had of the Party whose

*The Cutlers
of London do
give to each
Member a
Mark particular*

Mark, which cannot be used or appropriated, without a particular order and leave of the Company and Party, and so other Companies, 2 Cro. fol. 471.

Mark the same is; for as Flags are the Ensigns that give conusance of the Nation whose Ships they are, so Marks are to ascertain the Owners of their Property, without confusion or damage: And though to set the Mark of another Man alters not the Property, yet it may work such a detriment as may be very mischievous; and therefore by the *Common Law of England*, if *J. S.* shall maliciously set the mark of *J. D.* upon his Goods, to the intent *J. D.* shall or may be brought into any trouble, or put to any damage or charge, an Action of the Case will lie against *J. S.*

C H A P. VIII.

Of Factors.

I. Factors, their qualifications generally considered, in reference to their employment.

II. Of Commissions, and the words in the same, that qualifie them in their employment.

III. Of Commissions to Factors that limit their actions.

IV. Of a Factor that deals for several Merchants, of the Obligations that oblige, and not oblige each other.

V. Of their power, considered in reference to the dispensing with the Debtors of their Principals.

VI. Where the false Entry, or unfaithfulness of the Factor subjects him to answer damage to his Principal; and of

the like committed by the Principal, where to answer to the Factor.

VII. Of Goods remitted to Factors, and lost in their possession, who bears the misfortune.

VIII. Bills of Exchange drawn on the Factor by the Principal, and accepted, but before day of Payment the Principal becomes Bankrupt, whether the same must be paid.

IX. Of Freight of Ships by a Factor, where he is obliged to see the same discharged.

X. Of the general Rules to be used touching the Construction of their Actions.

I. **A** Factor is a Servant, created by a Merchant's Letters, and taketh a kind of Provision called Factorage, such Persons are bound to answer the loss, which happens by over-passing or exceeding their Commission; but a simple Servant, or an Apprentice can only incur his Master's displeasure. The Spaniard hath a Proverb, *Quien passa Commission, pierde Provision*; He that exceeds his Commission, shall lose his Factorage: But Time and Experience hath taught them to know better things; for now it is, *Subolca la paga, His Purse must pay for it*. The gain of Factorage is certain, however the success of the Voyage proves; and it is the prudence of Merchants to chuse honest and industrious Persons, for otherwise the Factor may grow rich, and the Merchant poor, the first being sure of his Reward, the latter uncertain of his Gain.

II. In

II. In Commissions they now generally insert these words: *Dispose, do, and deal therein, as if it were your own*; by which the actions of the Factor are to be excused, though it turns to his Principal's loss, because it shall be presumed he did it for the best, and according to his discretion.

III. But bare Commission to a Factor, to sell and dispose, will not enable him to trust, or give further day of payment; for in the due execution of his Authority, he ought on a Sale to receive *quid pro quo*, and as he delivers one to receive the other; for otherwise by that means, as they may trust six Months, they may trust sixteen years: Nor by the virtue of that Clause, of *Doing as if it were their own*, may they trust out to an unreasonable time, as ten or twenty years instead of one, two or three Months, which is the customary time for the like Commodities: And so it was adjudged, where one had remitted Jewels to his Factor in *Barbary*, who disposed of the same to *Mullehack* the Emperour, for a Sum certain to be paid at a time, which being elapsed, the Factor not obtaining it, was forced to make the same good to his Principal.

7 Fac. B. R.
Rot. 416. Bail-
ton & Sad-
docks. Butst.
1. part. 103.
Telu. 202. 2.
Med. 100, 101.

IV. Again, one and the same Factor may act for several Merchants, who must run the joynt risque of his actions, though they are meer Strangers to one another; as if five Merchants shall remit to one Factor five distinct Bales of Goods, and the Factor makes one joynt Sale of them to one Man, who is to pay one moiety down, and the other at six Months end; if the Vendee breaks before the second payment, each Man must bear an equal share of the loss, and be contented to accept of their Dividend of the Money advanced.

Salk. 126.

But if such a Factor draws a Bill of Exchange upon all those five Merchants, and one of them accepts the same, the others shall not be obliged to make good the payment, *Tamen quare de hoc*.

M'C. 17. Fac.
C. Van.
Ho. th versus
Tanner, Winch.
2. 25.

V. And as the Authority and trust reposed in Factors is very great, so ought they to be provident in their actions for the benefit of their Principals; and therefore if Factors shall give time to a Man for pay-
ment

Book III.

ment of Monies contracted on Sale of their Principal Goods, and after the time is elapsed, they shall sell Goods of their own to such Persons for ready Cash (leaving their Principals unreceived) and when such Man break, and become insolvent, the Factor in equity and honesty ought to make good the losses, for they ought not to dispense with the non-payment of their Principals Monies, after they become due, and procure payment of their own to another Man's loss; but by the Laws of *England* they cannot be compelled.

VI. Yet if Goods are remitted to a Factor, and upon arrival he shall make a false Entry at the Custom-house, or land them without the Customhouse, where they shall incur a seizure or forfeiture, whatsoever the Principal is endamaged, he must inevitably make good, nor will such general clause help him as above: But if a Factor makes his good Entry according to the Envoice, or his Letter of Advice, and it falls out the same are mistaken, if the Goods shall be lost, yet the Factor is discharged.

*Levison versus
Kirke, Trin. 7.
Jac. in B. R.
Lane's Rep. 65.*

And as Fidelity, Diligence, and Honesty are expected from the Factor, so the Law requires the like from the Principal, judging the Act of one to be the Act of the other; and therefore if a Merchant shall remit counterfeit Jewels to his Factor, who sells and disposes them for valuable Considerations, as if they were right, if the Factor receives any loss or prejudice thereby, by Imprisonment, or other Punishment, the Master shall not only make good the damage to the Factor, but also render Satisfaction to the Party damnified: And so it was adjudged, where one *How* was possessed of three counterfeit Jewels, and having Factors in *Barbary*, and knowing one *Southern*, a Merchant, was Resident on the place, consigns those Jewels to his Factor, who receiving them, intreated *Southern* to sell those Jewels for him, telling him that they were good Jewels, whereupon *Southern*, not knowing they were counterfeit, sold them to the King of *Barbary* for eight hundred pounds (they being worth really but one hundred pounds) and delivered the Money to the Factor,

Hill. 25 Jac. Factor, who remitted the same to *How*; the King of
2 Rolls. Rep. 5 *Barbary* not long after finding himself cozened, com-
B. R. Cro. 2. mitted *Southern* to Prison till he repaid the eight
part 468. hundred pounds. Whereupon *Southern* coming for-
Bridgman 126, England, brought his Action against *How*, and had
127. Popham. Judgment to recover his damage; for the Principal
143, not re- shall answer for his Factor in all cases where he is
solved in that privy to the Act or Wrong: And so it is in Contract
Book. if a Factor shall buy Goods on the account of the
Hill. 43. Eliz. Principal (especially if he has used so to do) the
B. R. Petty's Contract of the Factor will oblige the Principal to
and Soame's performance of the Bargain.
Case, Goldsb.
fol. 137.

* *Southel's*
Case, Cok. lib.
4. fol. 83.

VII. When Factors have obtained a *Provenue* or profit for their Principal, they must be careful how they dispose of the same, for without Commission or Order they must be responsible. Goods remitted to Factors, ought in honesty to be carefully preserved, for the trust is great that is reposed; and therefore a Factor robbed, in an Account brought against him by his Principal, the same shall discharge him. * And so it is if a Factor buys Goods for his Principal which afterwards happens to be damaged: the Principal must bear the Misfortune: But if a Factor shall dispose of the Goods of his Principal, and take the Money that is false, he shall there make good the loss; yet if he receives Monies, and afterwards the same is by Edict or Proclamation lessened in value, the Merchant, and not the Factor, must there bear the loss.

Again, in Letters of Credit, the Factor must be sure to see, whether the Commission is for a time certain, or to such a value, or not exceeding such Sum, or general, in which he must have a careful Eye.

Quere, If equity may not relieve in such case.

VIII. A Merchant remits Goods to his Factor, and about a Month after draws a Bill on him, the Factor having Effects in his hands, accepts the Bill, then the Principal breaks, against whom a Commission of Bankrupt is awarded, and the Goods in the Factor's hands are seized; it has been conceived, the Factor must answer the Bill notwithstanding, and come in as a Creditor for so much as he was enforced by reason of his acceptance to pay.

IX. If a Factor enters into a Charter-party with a Master for Freightment, the Contract obliges him; but if he lades aboard generally the Goods, the Principals and the Lading are made liable, and not the Factor for the Freightment.

The Principal orders his Factor, that as soon as he hath loaded, (he having Monies in his hand) to make an Assurance on the Ship and Goods, if the Ship happens to miscarry by the Custom of Merchants, he shall answer the same, if he hath neglected his Commission; so it is if he having made an Assurance, and loss hath occurred, he ought not to make a Composition without orders from his Principal.

X. Generally the actions of Factors do depend on Buying, Selling, Freightening, and all other the Heads that have been treated in the Second Book, by which their employment is universal in Matters Maritime and of Commerce; and the questions which would arise touching the same if treated on, would be *in infinitum*: However these are to be the Standard *rules* which should govern their actions, *viz.* honesty, faithfulness, diligence, and observing of Commission, or Instructions, which being considered, and weighed by those that shall be Judge of their Actions, a right understanding and determining of the matters arising between them and their Principals, would soon be ended.

But those sorts of Factors that have wanted these things, seldom or never render any other account, but long and tedious Chancery-Suits, by which they not only have endamaged their very Trade, but seek to marry their Principals to a double affliction, by obliging them to sue either a Beggar, or that which is worse, a naughty Man.

On the other hand, Factors that behave themselves worthily and prudently in the Service of their Principals ought after their tedious Service be numbered amongst those that justly challenge that worthy denomination of *Merchant*: And such was he who never made breach of Commission in the service of his Principal, but once; that was, when Wines were committed to him to dispose of, but the price (by reason

reason of a glut) fell, advice being given to the Principal of the same, who immediately in passion writes to his Factor to take a hammer and knock out the heads; but the Factor considering (that leave must be given to losers to speak) knew better things, and kept the Goods, and sold them for their full value; and when Accompts were to be made, instead of bringing to the Accompt of Wines, their heads knock'd out *per order*, worthily brought *per contra*, sold at their intrinsic value. Such faithful Ministers, I say, justly deserve that of our Saviour, *Well done, &c.* and to be no more called Factors, but Merchants.

C H A P. IX.

Of the Laws of Nature and of Nations.

Of the variety and contrariety of humane Actions, and whence they spring.

I. Of the difficulties that happen in the obstructing our Inquisition in finding that which is lawful.

II. Humane Laws from whence they flow, and wherefore the Laws of Nature are above ours.

III. No Man naturally more a Judge than another of Nature's Laws.

IV. Nature's Laws are instituted for inward goodness and virtue, but State-Laws for quiet and repose.

V. Of Punishment required by Kings against those that violate the Laws of Nature or Nations, though the same touch not them, nor their Subjects, and of punishing an equal.

VI. Of punishing an equal, where that right fails, and the reasons of the same.

VIII. Subjects ought not to seek Justice in the Territory of another Prince, but in their own, unless the Defendant become Fugitive.

IX. Of Kingdoms equal in Power cannot be commanded, but entreated, may be to execute the Judgment of another by the Law of Nations.

X. That such power of executing the Judgments or Decrees of any Foreign Nation, extends not to those of Life or Honour.

XI. Of executing the Judgments given in a Kingdom absolute, in another that is annexed by Conquest; and of the difference of that, and one by Union.

XII. Where that right fails in Plantations, and the reason of the same.

Plain reason shews us, that Natural and Mathematical Causes have more certitude than Civil; for Nature is always uniform and alike in its operations: Hence Fire always burns, and never melts; a Stone in the Air naturally tends downwards, and never stays in the middle. In Mathematical causes, ordinarily the forms are such, as have no middle interposed, as between even and odd there is no *medium participationis*; between a right line and a crooked, there is no middle sort of line; thus two and two always make four.

II. But

* In quid na-
turale sit spe-
randum in hic
qua bene secun-
dum naturam
se habent, non
in depravatis,
Arist. Polit.
1. 5.

II. But civil and humane actions proceeding from a mutable and various Principal (the Will *) can not always be alike or uniform: And besides the Will within, humane Actions without, are subject to different Circumstances, and to infinite Encounters by reason of which their excessive number, they can not be foreseen while Men are making Laws: Hence we may understand wherefore it is said, *Omnis definitio in jure est periculosa*; and that *summum Jus* at some time may be found *summa injuria*; as to render a Man his Sword, when he is actually mad, &c. And a Circumstance hath power to change the matter, so in the form of the Action, it leaves in the middle a latitude, sometimes inclining to one extreme, sometimes to another.

Non ideo id
Deum velle,
quia justum est
sed justum esse
(that is due in
Law) quia
Deus voluit.
Anaxarchus
apud plutar-
chum in A-
lexandro.

For Example, betwixt that which by precept we are commanded ever to do, and that which we are com-
manded never to do, is placed that which is lawful for us now and then to do, or not to do, in matters of our own right so far as they seem expedient, or not expedient for us: Thus *Joseph* is called a just Man because he thought of divorcing himself from *Martha* though upon circumstances he would not, &c. But that which perplexes us all here is, that this *licitum* leans sometimes more to the one hand, sometimes more to the other, sometimes more to that which is absolutely bad; from whence grow scruples and doubts, whether in such twilight we really participate more of light than of darkness; that is, more of good than of bad.

III. Humane Laws grow most out of these middle things, *ex mediis licitis*; and upon right examination we find, that a Man hath nothing else to dispute, for we (poor subordinate Vessels) cannot so much as deliberate *de absoluti debitis*, and *absoluti illicitis*, for they were in force before Man, Prince, or People were in being, and God himself cannot now alter them, they flowing intrinsically, either from his Sanctity, Wisdom and Justice, as he is a Creator and Governour; or else they flow from Nature, who is the rule (according to God's making it by that which is in himself) its right reason and honesty. This is rightness

Vasqu. 11.
Contrav. 54-4.
Grotius de Fu-
re Belli ac Pa-
cis, l. 1. c. 1.
§. 14.

rightness of Nature, together with that obligation we have to be subject to it, was not a moment after us, and therefore we could not determine any thing about it; for which cause we have not a legislative Power to alter or diminish any of Nature's Laws.

IV. St Paul tells us, of those *who without any after-knowledge of God's revealed Will or Laws to Man, were condemnable by these of Nature alone in the punishing the breakers thereof.* No Man is naturally more a Magistrate than another, otherwise what meant Cain, when after his Murder he cryed, *Whoever shall find me, will kill me?*

V. And though humane Laws remember us of those things, yet it is not as if they gave their original and primary force of obliging; yea, reason of State is not busied so much about inward Piety and Vertue, as it is about publick quiet and repose, or those actions which regard another Man's receiving right or wrong: And hence it is that great prodigality is not so severely punished as a little robbery; and that *malus homo potest esse bonus Civis*, the reason is, because though he may do himself wrong in his own rights, yet he may always do other Men right in theirs; neither is there any clear reason, wherefore those lesser Sins and Impieties should be punished by any but God, who is wisest to know them, justest to weigh the merit of them, and powerfullest to punish them.

This is the state of God's, and of Nature's Laws, to which we are all equally obliged, but our floating and circumstantiated Laws are only to give a rule for an equal and mutual community in things, which God and Nature gave us to dispose of as we would our selves.

VI. Hence it is, that Kings, and such as have equal power with Kings, have a right to require punishment, not only for Injuries committed against themselves or their Subjects, but for them also that do not peculiarly touch themselves; as where Persons commit Actions in violation of the Law of Nature or of Nations, for the liberty by punishments to provide

Grotius de Ju-
re Belli ac Pa-
cis, lib. 2. cap.
21.

Vide Chap. Pi-
racy, §. 11, 12.

Leg. extant. D.
quod metus.

Qui non reddit
faciendū quod
debet, reddet
patiendū quod
debet, Philo.
Peccare dum
f. stimatis, ad
panas ferendat
sestinatis.

provide for humane Society (as hath been already mentioned) was in the hand of every Man; but after Commonwealths and Courts of Justice were ordained, it resided in the hand of the highest Powers, not properly as they are over others, *but as they are under none*: For subjection to others has taken away that right; yea, so much more honest it is to vindicate other Mens injuries than our own, by how much more it is to be feared, that a Man in his own by too deep a resentment may either exceed a measure, or at least infect his Mind; however, this right of punishing an equal remains still in those places where the People remain as in great Families, and not in Cities, or under some Government; and therefore those that have now Possessions of any parts of the New World, or *American Isles*, till they have either voluntarily submitted to a Government, or put them and their discovery into the hands or protection of some Prince that may exercise power, there remains the old and natural right of punishing for offences: So likewise where Persons shall be assaulted by Pirates on the Seas, if they be overcome they may be immediately executed by the Law of Nature; for otherwise there would be a failure of power to punish such: Besides, the old natural liberty remains in all places where are no Judgments; so where they are taken and brought to a Port, and the Judge openly refuses the Tryal of them, or that the Tryal of them cannot be had, without an apparent detriment and loss to the Captors, Justice may be done upon them by the Law of Nature.

VII. Two Pirates resolving to assault and rob the next Vessel they meet with, (not knowing each others condition or design) encounter, and the one happens to be overcome by the other; the question is now, whether the above-mentioned right so far remains, as that the stronger may execute him whom he hath overcome? Right Reason dictates, that the evil-doer may be punished, not who should punish him; but that Nature sufficiently sheweth, that it is most convenient to be done by him that is Superior; yet doth it not demonstrate this to be necessary

except Superiour be taken in that sense, that the evil-doer be thought to have made himself thereby inferior to any other, and to have as it were degraded himself from the order of Men into the number of Beasts subject to no Man, and such are Pirates, who have no other denomination but Night-wolves, or Beasts of Prey. By Nature it is ordained, *That the better command the worse*: And Aristotle saith, *The worse are provided for the use of the better as well in Naturals as in Artificials*. It follows hence, that at least a guilty Person ought not to be punished by another equally guilty, to which purpose is that Saying of Christ, *Whosoever of you is without sin (that is such sin) let him throw the first stone*. Pertinent is that saying, *The Sentence can have no authority, where he that judgeth is to be condemned*: From whence it follows, that the right of punishing in such case, at such time ceases.

Arist. 7.
Pol. 14.

VIII. On the other hand, Subjects that have just cause of Action, and inhabit under their own Sovereign, ought not to wave his Justice, and fly into the Territory of another, but ought to seek it in their own, unless the Defendant becomes Fugitive. One Richard Hieron being a Merchant of London, and Liege-man of the King, and born in England, commenc'd a Suit against J. Walden Major of the Staple of Calice, and other Merchants of the Staple, caused them to be arrested in Flanders in the Court of the Duke of Burgundy, held in Bruges, for certain Injuries supposed by them to be made within the Jurisdiction of the King of England at Calice, and after the Defendants did appeal to the Parliament at Paris, and were there dismiss'd by a Judicial Sentence, for that they had no Cognizance or Ground to inquire or examine matters committed within the Jurisdiction of the King of England, and by his Subjects there inhabiting in a Foreign Court, the Record does make mention, that this was an act so derogating from the Law, and of so high a Contempt, that it was enacted, *Que brief de Proclamation issira, luy commandant a surceasar son dit action, & que s'il n'y ares sue les dits Defendants hors del Realm d'Angleterre per aucun maniere determinable* under

Rot. Parl.
17 E. 3. num.
26. cited in
Rolls Abridge-
ment sit. Pre-
rogative fol.
176.

the Jurisdiction and Obedience of the King of *England* ou son il ad jurisdiction. The Judgment given—*in reque i terra et* he shall be put out of the protection of the King of *England*, and forfeit all his Lands, Tenements, Goods, and Chattels, and that no Pardon shall be to him available.

IX. Yet Kingdoms which are equal in power, and having no dependance on each other, cannot be commanded nor corrected of another; but if there be a question, to execute the Decree or Judgment of one in the Territory of the other, there may issue forth a Commission of Entreaty under the Seal of that Court where the Judgment was given, or at least under the Great Seal of the Prince, directed to the Judges in that place where the Defendant is resident, and the Judge to whom the said Commission is directed may award Execution, according to the Laws of Nations: And so it was adjudged, where one having recovered a Debt before the Governour of *Friesland*, the Defendant upon that fled for *England* to the Governour, at the Request of the Plaintiff issued forth his Commission of Request, directed *Omnibus Magistratibus infra Regnum Anglia, rogans*, to make Execution of the said Judgment; upon which the Judge of the Admiralty in *England* issued forth Execution of that Sentence, and the Defendant was taken, upon which he brought his *Habeas Corpus* and adjudged the Sentence well executed by the Law of Nations, and according to the *Common Law* of the Realm.

So likewise if a *Dutch-man* takes up Goods at the Port of *London*, and gives a Note under his hand for the payment of the same, and then flies into *Holland*, the Vendor may apply himself to the *Lord-Mayor* of *London*; and upon proof of the delivery, and Sale of the Goods, the *Lord-Mayor* making a Certificate of the same, and sending it under the Great Seal, directed, as above, they of *Holland* will and execute the same upon the Party.

Herein this last Case differs from the first; for the former, if there should fall a question about the interpretation of the Judgment or Sentence,

1 Ro. Ab. 530.

1 Lev. 267.

1 Sid. 418.

1 Ven. 32.

2 Keb. 511,

60.

same cannot be done, for they are not to examine the same; and the reason is, lest the Stranger be induced at another time to do the like, and so dissolve the Judgments whereof they should demand the Execution, the which would be done more through Jealousie of the State, than for any injustice in them: Besides, the Judgments or Sentences, which are matters of Record, and of the greatest security in a Kingdom, the presumption that they were justly given, shall always be understood.

X. But in the latter the same may be examined, that is, the Merchant may be heard as to his legal defence, either to the lessening or discharging the debt or damage, but against the testimony certified, no objection can be made, but the same is admitted, as legally proved.

But if there be a question of honour or life, there they may not execute the Judgments of Foreign Judges, especially if they have not known the merit of the Causes, or seen the Informations, or heard the Witnesses; but more especially in *England*, for there in no respect whatsoever the life of a Man (let his offence be never so heinous) be brought to punishment without a legal Tryal, * and that by the producing of Witnesses *viva voce* to his face; yet Princes for the respect they bear each other, and for the good of Justice, though they cannot at the bare request of the Judges of another Prince, put them to death; yet they may for exemplary punishments which ought to be made upon the places where the crime was committed) yield the natural Subject to his natural Prince, unless the Prince to whom the Fugitive is fled, finds that he is unjustly pursued; for in such cases he is not bound to yield them; yea he is forbidden by the Law of God to restore a bond-man, which is fled into another Man's house to avoid the fury of his Master.

XI. And as the same is in cases Foreign, so likewise in those Estates that are under the Crown of *England*; and therefore if a Man recovers against * *J. S.* the King's Bench in *England*, and then the Defendant flies over into *Ireland*; the Judgment may be

* *Coke 4. In. sit fol. 38.*

*Soto de Just. & Jure, l. 5. qu. 1. Art. 7. Statius judicamus esse paucos aliquos mala ferre, quam inmensam multitudinem, Zonaras * Paseb. 24. Car 2. in B.R. in Hibern. inter Warde and Moor.*

certified over into the *Chancery* in *Ireland*, and they may by *Mittimus* send it into the King's Bench there, and they may award execution, or otherwise the Party may bring his Action of Debt on the same; so the like has been done for Decrees given in the *Chancery* in *England*, which have been exemplified under the Great Seal, directed to the King's Lieutenant, for the putting the same in execution there; but in no case a Judgment given in *England* may be certified over under any other Seal but that of the Great one.

*Vide the Act
of Parliament
for the Union
of England
and Scotland.*

But in *Scotland* it is otherwise; for that is a Kingdom absolute, and not like *Ireland*, which is a Crown annexed by *Conquest*, but the other is by Union; and though they be united under one Prince *ad fidem*, yet their Laws are distinct, so as if they had never been united; and therefore the execution of the Judgments in each other, must be done upon Request, as above, and that according to the Laws of Nations.

XII. But Colonies or Plantations, which are reduced into the condition of great Families, have not this Right of Requesting, for they are governed by the Laws prescribed by the Sovereign of the same, who may set Jurisdictions, and make them places privileged, not to have the Persons attached or arrested in any other places, but within their own bounds so likewise upon their first forming or Institution may so declare that for any Debt or Contract made or done in any place but in that of the same Plantation, they shall not be impleaded; and therefore in *Virginia* at this day, if a Man contracts a Debt in *England*, and flies to the same, he cannot be there impleaded: But if a Man takes up Goods; and carries the same over thither, there he may be sued in the place so likewise if it can be proved he carried over the Money borrowed, and this amongst others of the Laws and Constitutions of those Plantations, is preserved inviolably, the same being as it were a pledge and general safety, which is given to those Inhabitants that shall resort thither, and there plant themselves for the good of the place; and although those

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those that thither fly, by reason of great and unreparable losses, have contracted Debts far beyond their ability to satisfy, a failure of which, in strictness of Law, may (if the Creditor pleases) oblige their Bodies to imprisonment; yet doth it not thence follow that the same ought to be exacted; for though the Carcass of Man may gratify the Revenge of the Creditor, yet it never can pay the debt; wherefore if those ends by themselves in a moral estimation be not necessary; or if other ends on the opposite part occur, not less profitable or necessary; or if the ends proposed by Imprisonment may be attained any other way, it will then follow that if there be nothing of obligation on the Debtors part, to render himself a Prisoner to the Creditor, that then if the same can or may be avoided by flight, the same in conscience may be done; according to that of Cicero *, *It was not fit perhaps to dismiss him being brought to Judgment, but that he should be inquired after, and brought to Judgment, was not necessary.*

* *Ad Quintum*
Trad. l. 21.]

FINIS.

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